

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT

Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5621

158

HALSEY McGOVERN, APPELLANT,

Belle M. Cain, Executrix of the Estate of Ben B. Cain, de
MOULTRIE HITT, ~~BEN B. CAIN~~, AND BIRD M.
ROBINSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 2, 1932.

PRINTED APRIL 15, 1932.

Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5621

HALSEY McGOVERN, APPELLANT,

vs.

MOULTRIE HITT, BEN B. CAIN, AND BIRD M.
ROBINSON, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5621.

HALSEY MCGOVERN, Appellant,

vs.

MOULTRIE HITT et al.

a Supreme Court of the District of Columbia.

At Law.

No. 76058.

HALSEY MCGOVERN, Plaintiff,

vs.

MOULTRIE HITT, BEN B. CAIN, and BIRD M. ROBINSON,
Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Declaration.

Filed November 5, 1928.

In the Supreme Court of the District of Columbia.

At Law.

No. 76058.

HALSEY MCGOVERN, Plaintiff,

vs.

MOULTRIE HITT, BEN B. CAIN, and BIRD M. ROBINSON,
Defendants.

First Count.

The plaintiff, Halsey McGovern, sues the defendants, Moultrie Hitt, Ben B. Cain and Bird M. Robinson, for that

heretofore, to wit: That on or about August 1, 1925, the plaintiff was, and had been for many years, a traffic expert engaged in practice before the Interstate Commerce Commission, and the defendants, Moultrie Hitt, Ben B. Cain and Bird M. Robinson were, and the defendants Ben B. Cain and Bird M. Robinson still are, Assistant to the President, Vice-President and General Counsel, and President, respectively, of The American Short Line Railroad Association; that the defendants, being then and there under contract with approximately 173 short line railroads to handle the Railway Mail Pay Case, I. C. C. Docket No. 9200, before the Interstate Commerce Commission, did employ the plaintiff to prepare and prosecute the said case, and the defendants then and there undertook and faithfully promised to pay the plaintiff the reasonable worth and value of his services; and the plaintiff accepted the said professional employment and actively continued therein at the special instance and request of the said defendants, and prepared and prosecuted the said case

2 before the said Commission during the period from, to wit, August 1, 1925 to, to wit, August 1, 1928, to a successful conclusion; that as a result of the plaintiff's services the defendants have received or are about to receive a total fee of approximately Four Hundred Thousand (\$400,000.00) Dollars; and the plaintiff says that the fair and reasonable value of the services rendered by him for and on behalf of the said defendants is the sum of Two Hundred Thousand (\$200,000.00) Dollars; and that he is reasonably entitled to receive from the said defendants the sum of Two Hundred Thousand (\$200,000.00) Dollars; that although often demanded, the defendants, disregarding their promise and agreement to pay the plaintiff the reasonable worth and value of his services, but intending to deprive him thereof, have not nor has anyone for them, paid the said sum or any part thereof.

Wherefore the plaintiff brings this suit and claims from the defendants the sum of Two Hundred Thousand (\$200,000.00) Dollars, with interest from August 1, 1928, according to the bill of particulars hereto annexed and made a part hereof, besides costs.

Second Count.

The plaintiff, Halsey McGovern, sues the defendants, Moultrie Hitt, Ben B. Cain and Bird M. Robinson, for

other money payable by the defendants to the plaintiff; and for goods sold and delivered by the plaintiff to the defendants; and for work done and materials provided by the plaintiff for the defendants at their request; and for money lent by the plaintiff to the defendants; and for money paid by the plaintiff for the defendants at their request; and for money received by the defendants
3 for the use of the plaintiff; and for money found to be due from the defendants to the plaintiff on account stated between them.

And the plaintiff claims the sum of Two Hundred Thousand (\$200,000.00) Dollars, with interest from August 1, 1928, according to the bill of particulars hereto annexed and made a part hereof, besides costs.

P. M. COOK,
Attorney for the Plaintiff.

Particulars of Demand.

* * * * *

August 1, 1928.

Messrs. Moultrie Hitt, Ben B. Cain, and Bird M. Robinson
to Halsey McGovern, Dr.

To services rendered as traffic consultant and practitioner before the Interstate Commerce Commission in the preparation and prosecution of the Railway Mail Pay Case, I. C. C. Docket No. 9200, on behalf of 173 associated short line railroads, covering the period from August 1, 1925 to August 1, 1928, inclusive.. \$200,000.00
With interest from August 1, 1928.

P. M. COOK,
Attorney for the Plaintiff.

4 *Plea of Defendant Bird M. Robinson.*

Filed November 28, 1928.

* * * * *

I.

The defendant Bird M. Robinson, for plea to the first count of the declaration in the above-entitled case says:

He admits that at the time alleged in the declaration he was the president of the American Short Line Railroad Association; that the defendant Moultrie Hitt was then assistant to the president of said association and that the defendant Ben B. Cain was then vice-president and general counsel thereof. He also admits that the plaintiff rendered certain assistance in the preparation of the case mentioned in said declaration for presentation before the Interstate Commerce Commission, but he was not so employed either directly or indirectly by this defendant, or at his instance or request, said assistance being rendered over a period from, to wit, August 1, 1925, to November 1, 1927. This defendant says that as yet no fees have been received in said case and that the amount which will be received, if any, in the future, is so problematical that it is impossible at this time to state what the amount to be received will be. He also admits that the defendants have not paid the plaintiff the sum of Two Hundred Thousand Dollars in his declaration demanded.

All the other allegations of said plea are hereby denied.

J. WILMER LATIMER,
Attorney for Defendant Bird M. Robinson.
 C.

5 *Plea of Defendant Ben B. Cain.*

Filed November 28, 1928.

* * * * *

I.

The defendant Ben B. Cain for plea to the first count of the declaration in the above-entitled case says:

He admits that at the time alleged in the declaration he was vice-president and general counsel of the American Short Line Railroad Association; that the defendant Bird M. Robinson was then the president of said association and that the defendant Moultrie Hitt was then assistant to the president of said association. He also admits that the plaintiff rendered certain assistance in the preparation of the case mentioned in said declaration for presentation before the Interstate Commerce Commission at the instance of and under contract with Moultrie Hitt, acting for him-

self only and not for or on behalf of this defendant, said assistance being rendered over a period from, to wit, August 1, 1925, to November 1, 1927. This defendant says that as yet no fees have been received in said case and that the amount which will be received, if any, in the future, is so problematical that it is impossible at this time to state what the amount to be received will be. He also admits that the defendants have not paid the plaintiff the sum of Two Hundred Thousand Dollars in his declaration demanded.

All the other allegations of said plea are hereby denied.

GILBERT L. HALL,

Attorney for Deft. Cain.

6

Plea of Defendant Moultrie Hitt.

Filed November 28, 1928.

* * * * *

I.

The defendant Moultrie Hitt for plea to the first count of the declaration in the above-entitled case says:

He admits that at the time alleged in the declaration he was assistant to the President of the American Short Line Railroad Association and that the defendant Bird M. Robinson was then president of the said association, and that the defendant Ben B. Cain was then vice-president and general counsel of said association. He also admits that the plaintiff assisted in the preparation of the case mentioned in said declaration for presentation before the Interstate Commerce Commission, said assistance being rendered over a period from, to wit, August 1, 1925, to November 1, 1927, but this defendant says that the assistance rendered by plaintiff was pursuant to the two contracts hereinafter referred to, under which this defendant employed plaintiff to render the services mentioned in said contracts for a fixed monthly remuneration as therein stated; that the first of said contracts was oral and made on, to wit, August 1, 1925, and by its terms plaintiff agreed to render services as in said declaration mentioned, to this defendant for a year, or as long as his services might be required, for a monthly salary of Two Hundred and Seventy-five Dollars (\$275.00); that plaintiff rendered said services and this defendant paid

He admits that at the time alleged in the declaration he was the president of the American Short Line Railroad Association; that the defendant Moultrie Hitt was then assistant to the president of said association and that the defendant Ben B. Cain was then vice-president and general counsel thereof. He also admits that the plaintiff rendered certain assistance in the preparation of the case mentioned in said declaration for presentation before the Interstate Commerce Commission, but he was not so employed either directly or indirectly by this defendant, or at his instance or request, said assistance being rendered over a period from, to wit, August 1, 1925, to November 1, 1927. This defendant says that as yet no fees have been received in said case and that the amount which will be received, if any, in the future, is so problematical that it is impossible at this time to state what the amount to be received will be. He also admits that the defendants have not paid the plaintiff the sum of Two Hundred Thousand Dollars in his declaration demanded.

All the other allegations of said plea are hereby denied.

J. WILMER LATIMER,
Attorney for Defendant Bird M. Robinson.
C.

5 *Plea of Defendant Ben B. Cain.*

Filed November 28, 1928.

* * * * * * *

I.

The defendant Ben B. Cain for plea to the first count of the declaration in the above-entitled case says:

He admits that at the time alleged in the declaration he was vice-president and general counsel of the American Short Line Railroad Association; that the defendant Bird M. Robinson was then the president of said association and that the defendant Moultrie Hitt was then assistant to the president of said association. He also admits that the plaintiff rendered certain assistance in the preparation of the case mentioned in said declaration for presentation before the Interstate Commerce Commission at the instance of and under contract with Moultrie Hitt, acting for him-

self only and not for or on behalf of this defendant, said assistance being rendered over a period from, to wit, August 1, 1925, to November 1, 1927. This defendant says that as yet no fees have been received in said case and that the amount which will be received, if any, in the future, is so problematical that it is impossible at this time to state what the amount to be received will be. He also admits that the defendants have not paid the plaintiff the sum of Two Hundred Thousand Dollars in his declaration demanded.

All the other allegations of said plea are hereby denied.

GILBERT L. HALL,
Attorney for Deft. Cain.

6

Plea of Defendant Moultrie Hitt.

Filed November 28, 1928.

* * * * *

I.

The defendant Moultrie Hitt for plea to the first count of the declaration in the above-entitled case says:

He admits that at the time alleged in the declaration he was assistant to the President of the American Short Line Railroad Association and that the defendant Bird M. Robinson was then president of the said association, and that the defendant Ben B. Cain was then vice-president and general counsel of said association. He also admits that the plaintiff assisted in the preparation of the case mentioned in said declaration for presentation before the Interstate Commerce Commission, said assistance being rendered over a period from, to wit, August 1, 1925, to November 1, 1927, but this defendant says that the assistance rendered by plaintiff was pursuant to the two contracts hereinafter referred to, under which this defendant employed plaintiff to render the services mentioned in said contracts for a fixed monthly remuneration as therein stated; that the first of said contracts was oral and made on, to wit, August 1, 1925, and by its terms plaintiff agreed to render services as in said declaration mentioned, to this defendant for a year, or as long as his services might be required, for a monthly salary of Two Hundred and Seventy-five Dollars (\$275.00); that plaintiff rendered said services and this defendant paid

plaintiff therefor the sum of Two Hundred and Seventy-five Dollars monthly as agreed until, to wit, February 28, 1926; and beginning on, to wit, March 1, 1926, this
7 defendant paid plaintiff therefor the sum of Three Hundred Dollars monthly until, to wit, April 25, 1927, upon which last date the plaintiff and this defendant entered into a written contract, prepared by the plaintiff, which by its terms expressly superseded and voided any and all understandings or agreements theretofore entered into between plaintiff and this defendant. A copy of the last aforesaid contract is hereto attached, marked Exhibit A, and made a part hereof and prayed to be taken and read herewith. Under the terms of the said contract the plaintiff, designated therein as the party of the second part

“1. Agrees and obligates himself to prepare all exhibits and compilations as he believes will properly and effectively present the right and need for increase in railway mail pay for the 174, more or less, short and weak railroads which are designated variously in the Associated Short Lines or the American Short Line Railroad Association group, in the proceedings now pending in I. C. C. Docket No. 9200, before the Interstate Commerce Commission;

“2. Agrees and obligates himself to present in person the necessary supporting testimony and explanations in connection with such exhibits and compilations;

“3. Agrees and obligates himself to prepare and write a first draft of the brief for account of the aforesaid short and weak lines represented by party of first part, and to aid in its completion as far as may be desired;

“4. Party of second part to appear of record and on brief.”

And under the same contract this defendant

“1. Agrees to pay to party of second part \$3,000.00 in ten monthly installments of \$300.00 each, the first of such installments to be paid June 1st, 1927, and the remaining nine installments on the first of each of the nine months following June, 1927;

“2. Agrees further to pay to party of second part an additional \$2,000.00 in one sum, contingent upon these mail pay case or cases presented by party of second part resulting in an aggregate net return of \$100,000.00 or more to

the party of the first part and his associates, from proceedings before the Interstate Commerce Commission, without having to further resort to the courts;

8 “3. Agrees to pay for the services of J. H. Hunt at a salary of \$150.00 per month, for the months of May and June;

 “4. Agrees to assume the expense of stenographic, typing or other assistance incident to the copying of exhibits, testimony and brief;

 “5. Agrees to assume any and all reasonable traveling expenses of party of second part, incident to attendance at hearing at any point other than Washington, D. C.”

And this defendant states that he paid plaintiff the sum of Three Thousand Dollars (\$3,000) in ten monthly installments of Three Hundred Dollars (\$300) each, the first of such installments being paid on, to wit, June 1, 1927, and the remaining nine installments on, to wit, the first of each of the nine months following June, 1927; and this defendant further paid for the services of J. H. Hunt at a salary of One Hundred and Fifty Dollars (\$150) per month for, to wit, the months of May and June, and this defendant further assumed and paid the expenses of the stenographic, typing and other assistance which was employed incident to the copying of exhibits, testimony and brief; and he further assumed and paid any and all reasonable traveling expenses of the plaintiff incident to attendance at hearing at points other than Washington, D. C., to wit, at Atlantic City, New Jersey; all as provided in paragraphs numbered 1, 3, 4 and 5 of the written contract aforesaid, which defines the obligations of the defendant under said contract. Defendant admits he has not paid plaintiff the additional sum of Two Thousand Dollars (\$2,000) contingently provided for in said contract for the reason that as yet the said case (or cases) has (or have) not resulted in an aggregate net return of One Hundred Thousand Dollars to this Defendant and his associates, and for the further reason that it became necessary to resort to the courts in an effort

9 to collect the amounts awarded to the clients of this defendant and his associates, and the matter is now pending before the Supreme Court of the United States. This defendant admits that the defendants have not paid the plaintiff the sum of Two Hundred Thousand Dollars in his declaration demanded.

plaintiff therefor the sum of Two Hundred and Seventy-five Dollars monthly as agreed until, to wit, February 28, 1926; and beginning on, to wit, March 1, 1926, this

7 defendant paid plaintiff therefor the sum of Three Hundred Dollars monthly until, to wit, April 25, 1927, upon which last date the plaintiff and this defendant entered into a written contract, prepared by the plaintiff, which by its terms expressly superseded and voided any and all understandings or agreements theretofore entered into between plaintiff and this defendant. A copy of the last aforesaid contract is hereto attached, marked Exhibit A, and made a part hereof and prayed to be taken and read herewith. Under the terms of the said contract the plaintiff, designated therein as the party of the second part

“1. Agrees and obligates himself to prepare all exhibits and compilations as he believes will properly and effectively present the right and need for increase in railway mail pay for the 174, more or less, short and weak railroads which are designated variously in the Associated Short Lines or the American Short Line Railroad Association group, in the proceedings now pending in I. C. C. Docket No. 9200, before the Interstate Commerce Commission;

“2. Agrees and obligates himself to present in person the necessary supporting testimony and explanations in connection with such exhibits and compilations;

“3. Agrees and obligates himself to prepare and write a first draft of the brief for account of the aforesaid short and weak lines represented by party of first part, and to aid in its completion as far as may be desired;

“4. Party of second part to appear of record and on brief.”

And under the same contract this defendant

“1. Agrees to pay to party of second part \$3,000.00 in ten monthly installments of \$300.00 each, the first of such installments to be paid June 1st, 1927, and the remaining nine installments on the first of each of the nine months following June, 1927;

“2. Agrees further to pay to party of second part an additional \$2,000.00 in one sum, contingent upon these mail pay case or cases presented by party of second part resulting in an aggregate net return of \$100,000.00 or more to

the party of the first part and his associates, from proceedings before the Interstate Commerce Commission, without having to further resort to the courts;

8 “3. Agrees to pay for the services of J. H. Hunt at a salary of \$150.00 per month, for the months of May and June;

“4. Agrees to assume the expense of stenographic, typing or other assistance incident to the copying of exhibits, testimony and brief;

“5. Agrees to assume any and all reasonable traveling expenses of party of second part, incident to attendance at hearing at any point other than Washington, D. C.”

And this defendant states that he paid plaintiff the sum of Three Thousand Dollars (\$3,000) in ten monthly installments of Three Hundred Dollars (\$300) each, the first of such installments being paid on, to wit, June 1, 1927, and the remaining nine installments on, to wit, the first of each of the nine months following June, 1927; and this defendant further paid for the services of J. H. Hunt at a salary of One Hundred and Fifty Dollars (\$150) per month for, to wit, the months of May and June, and this defendant further assumed and paid the expenses of the stenographic, typing and other assistance which was employed incident to the copying of exhibits, testimony and brief; and he further assumed and paid any and all reasonable traveling expenses of the plaintiff incident to attendance at hearing at points other than Washington, D. C., to wit, at Atlantic City, New Jersey; all as provided in paragraphs numbered 1, 3, 4 and 5 of the written contract aforesaid, which defines the obligations of the defendant under said contract. Defendant admits he has not paid plaintiff the additional sum of Two Thousand Dollars (\$2,000) contingently provided for in said contract for the reason that as yet the said case (or cases) has (or have) not resulted in an aggregate net return of One Hundred Thousand Dollars to this Defendant and his associates, and for the further reason that it became necessary to resort to the courts in an effort

9 to collect the amounts awarded to the clients of this defendant and his associates, and the matter is now pending before the Supreme Court of the United States. This defendant admits that the defendants have not paid the plaintiff the sum of Two Hundred Thousand Dollars in his declaration demanded.

All the other allegations of said declaration are hereby denied.

WALTER C. CLEPHANE,
Attorney for Defendant Moultrie Hitt.

EXHIBIT A.

In the Supreme Court of the District of Columbia.

At Law.

No. 76058.

HALSEY MCGOVERN, Plaintiff,

vs.

MOULTRIE HITT, BEN B. CAIN, and BIRD M. ROBINSON,
Defendants.

*Memorandum of Agreement Between Moultrie Hitt, and
Halsey McGovern in re Short Line Railroad Mail Pay
Case.*

Whereas, Moultrie Hitt is under contract with the Railway Mail Pay Committee of the American Short Line Railroad Association to prepare for and conduct a case seeking an increase in mail pay for the 174 short lines named in the attached, who are participating together in such case or cases, and as a part of that contract it has devolved on said Moultrie Hitt to have made certain voluminous compilations and studies for use in such case, the cost of which is being presently borne by said Moultrie Hitt, but which will be charged to the expenses of the case;

And whereas, Halsey McGovern, launching out for himself in the profession of Traffic Consultant, working
10 in association with said Moultrie Hitt, agreed for one year to undertake to direct statistical compilations and make traffic studies which his experience would suggest, and otherwise prepare data and testimony for the case, with the understanding that clerical and stenographic help and office space, etc., would be provided and other expenses paid; and that while said Halsey McGovern would carry on this work, he would not give it his exclusive attention, but would, at the same time, be building up his own business of traffic consultations, etc.;

And whereas, under these circumstances it was mutually agreed that, in addition to paying said Halsey McGovern an assured compensation net to said McGovern at the rate of \$300.00 per month for the time devoted to this special work, and expenses incident thereto, no matter how the case resulted, said McGovern could contingently be paid further compensation in the event of a successful outcome of the case, the sum of Five Thousand Dollars (\$5,000.00) being tentatively named as the additional contingent compensation, if the amounts received in fees total as the result of a successful outcome netted said Moultrie Hitt and his associates One Hundred Thousand Dollars (\$100,000.00), or over;

And whereas, this work has been more extensive and has taken longer than was originally contemplated, and has prevented said Halsey McGovern from accepting some other work which would have netted substantial fees for him, and whereas developments have become such that said Halsey McGovern deems it essential to the welfare of his own business to open a separate office of his own, and in the meantime, although the statistical compilations and statistical studies are rounding into shape, there is still much to do, and it is mutually desired that said Halsey McGovern should carry this work to a conclusion, but at the same time it is recognized that it would be unfair to expect him to continue to sacrifice opportunities, and the studies have now progressed to a point where there is sound reason to confidently rely on a successful outcome of this case;

Therefore, it is mutually agreed that the original tentative understanding shall now be modified and more definitely stated as follows:

It is agreed and understood between Moultrie Hitt, party of the first part, and Halsey McGovern, party of the second part, that—

Party of the second part

1. Agrees and obligates himself to prepare all exhibits and compilations as he believes will properly and effectively present the right and need for increase in railway mail pay for the 174, more or less, short and weak railroads which are designated variously in the Associated Short Lines or the American Short Line Railroad Association group, in the

proceedings now pending in I. C. C. Docket No. 9200, before the Interstate Commerce Commission;

2. Agrees and obligates himself to present in person the necessary supporting testimony and explanations in connection with such exhibits and compilations;

3. Agrees and obligates himself to prepare and write a first draft of the brief for account of the aforesaid short and weak lines represented by party of the first part, and to aid in its completion as far as may be desired;

4. Party of second part to appear of record and on brief.

Party of the first part

1. Agrees to pay to party of the second part \$3,000.00 in ten monthly installments of \$300.00 each, the first of such installments to be paid June 1st, 1927, and the remaining nine installments on the first of each of the nine months following June, 1927;

2. Agrees further to pay to party of the second part an additional \$2,000.00 in one sum, contingent upon these mail pay case or cases presented by party of the second part resulting in an aggregate net return of \$100,000.00 or more to party of first part and his associates, from proceedings before the Interstate Commerce Commission, without having to further resort to the courts;

3. Agrees to pay for the services of J. H. Hunt, at a salary of \$150.00 per month, for the months of May and June;

4. Agrees to assume the expense of stenographic typing or other assistance incident to the copying of exhibits, testimony and brief;

5. Agrees to assume any and all reasonable traveling expenses of party of second part, incident to attendance at hearing at any point other than Washington, D. C.

It is understood that the herein agreement and understandings supersede and void any and all understandings or agreements which may have heretofore been entered into between these parties with respect to the group of said Associated Short Lines represented for the Railway Mail Pay Committee of The American Short Line Railroad Association in the mail pay case.

(Signed)

MOULTRIE HITT,

Party of First Part.

(Signed)

HALSEY McGOVERN,

Party of Second Part.

Washington, D. C., April 25, 1927.

12

Amended Replication.

Filed January 7, 1929.

* * * * *

Now comes the plaintiff, by his attorney, and with leave of this Court first had and obtained, files this amended replication to the plea of the defendant, Moultrie Hitt, filed herein, and says:

The plaintiff denies entering into an oral contract on August 1, 1925, as alleged in the plea of the said defendant, Moultrie Hitt.

The plaintiff admits entering into a written contract dated April 25, 1927, prepared not by the plaintiff but by the defendant, and believes the defendant's Exhibit "A" is a true copy thereof but begs leave to refer to the original, but says that the said defendant, Moultrie Hitt, willfully and arbitrarily breached one of the material provisions of said contract which provided "Party of second part (plaintiff) to appear of record and on brief", in that the said defendant willfully omitted and refused to put the plaintiff's name on the second and final brief dated June 27, 1928, filed with the Interstate Commerce Commission in the said Mail Pay Case; that the plaintiff assisted in the preparation of the said second and final brief; and the plaintiff says that on July 7, 1928 and August 29, 1928, the plaintiff duly notified the said defendant of his election to treat the said contract as discharged and demand the reasonable value of his services.

The plaintiff denies that the said Mail Pay Case is now pending before the Supreme Court of the United States or any other Court.

13 All of which the plaintiff is ready to verify.

P. M. COOK,

Attorney for the Plaintiff.

Rejoinder by Defendant Moultrie Hitt.

Filed January 10, 1929.

* * * * *

The defendant Moultrie Hitt for rejoinder to the amended replication, says:

He joins issue upon so much of the said amended replication as denies the averments of this defendant's plea.

Except in so far as said amended replication contains admissions of matter in this defendant's plea, this defendant denies each and all of the affirmative averments in said amended replication.

WALTER C. CLEPHANE,
Attorney for Defendant Moultrie Hitt.

*Joint and Several Plea of Defendants Puis Darrein
Continuance.*

Filed March 31, 1931.

* * * * *

These defendants for a joint and several plea puis darrein continuance, without admitting that any sum whatsoever has become or is due to the plaintiff on any such contract as is declared upon in this case, nevertheless say that since the issue was joined in the above entitled case and before this date, to wit, on the 5th day of July, 1929,

14 the mail pay cases referred to in the second paragraph of the obligations of the defendant Hitt to the plaintiff as the same are recited in the contract between him and the plaintiff described in the plea of the defendant Hitt, resulted on, to wit, the 5th day of July, 1929, and not before that date, in an aggregate net return of One Hundred Thousand Dollars (\$100,000) to said defendant and his associates, on which date last aforesaid and not before, the fees paid to them on account of said cases, amounted to the sum last aforesaid, whereby on that date and not before, there became due and owing to the plaintiff from the defendant Hitt the additional sum of Two Thousand Dollars as in said contract provided, and no more.

And these defendants further say that after the fees received by the defendant Hitt and his associates as hereinabove recited had reached the sum of One Hundred Thousand Dollars (\$100,000) as aforesaid, the said defendant Hitt was ready and willing and, to wit, on the 25th day of March, 1931, to wit, at the City of Washington in the District of Columbia, tendered and offered

to pay to said plaintiff the sum of Two Thousand Dollars as in said contract recited in said plea was agreed upon, with interest from the date as hereinabove recited when said fees first amounted to the said sum of One Hundred Thousand Dollars, to the date of said tender, the sum so tendered amounting to Two Thousand Two Hundred and Eight Dollars and twenty-two Cents (\$2,208.22), to receive which said sum of said defendant Hitt, the said plaintiff then and there wholly refused; and these defendants further say that the said defendant Hitt, always from the date last aforesaid has been ready to pay and still is ready to pay to the said plaintiff as provided in the contract recited in said plea the said sum of Two Thousand Dollars

(\$2,000) with interest as aforesaid; and the defendant Hitt has paid the same into the registry of this Court ready to be paid to the said plaintiff under said contract if he will accept the same.

These defendants plead the above facts puis darrein continuance in the place and stead of so much of any former pleas as admits that the plaintiff had not been paid the sum of Two Thousand Dollars aforesaid and states the reason for such non-payment.

Wherefore these defendants pray judgment if the plaintiff ought further to have or maintain his aforesaid action against them or any of them.

MOULTRIE HITT.
BIRD M. ROBINSON.
BEN B. CAIN.

WALTER C. CLEPHANE,
Attorney for Defendant Moultrie Hitt.

J. WILMER LATIMER,
C.,

Attorney for Bird M. Robinson.

GILBERT L. HALL,
C.,

Attorney for Ben B. Cain.

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing and annexed plea puis darrein continuance, and are familiar

with its contents, and that we verily believe the facts therein stated to be true.

BEN B. CAIN.
BIRD M. ROBINSON.
MOULTRIE HITT.

Subscribed and sworn to before me by Ben B. Cain, Bird M. Robinson, and Moultrie Hitt this 30th day of March, 1931.

[NOTARIAL SEAL.]

MARY G. KITE,
Notary Public, D. C.

16 *Replication to Plea Puis Darrein Continuance.*

Filed April 1, 1931.

* * * * * *

Now comes the plaintiff, by his attorney, and for replication to the joint and several pleas, puis darrein continuance, filed by the defendants herein, admits that on the 25th day of March 1931 the defendants tendered the plaintiff the sum of \$2208.22 and that the plaintiff refused to accept said sum; and the plaintiff joins issue upon the rest of the plea of the said defendants.

P. M. COOK,
Attorney for the Plaintiff.

Memorandum Opinion.

Filed November 4, 1931.

* * * * * *

Plaintiff's only allegation of a breach of the contract of employment is that defendants failed to put his name upon the second brief filed before the Interstate Commerce Commission.

1. I think it is very doubtful whether the contract of employment required defendants to put his name upon any brief. The contract may be just as consistently construed as an agreement by plaintiff that his name might be put upon the briefs.

2. I am convinced that the breach relied on is so slight that it did not justify plaintiff in rescinding the contract and suing for the reasonable value of the services.

Plaintiff admits that his services had all been performed, and that each one of the five agreements by defendant Hitt had been fully performed.

17 The first or main brief had been prepared and filed with the Interstate Commerce Commission.

Plaintiff's appearance had been entered and his name was upon that brief.

Plaintiff's counsel admit in their opening statement also that the printed report of the decision of the Interstate Commerce Commission, both in pamphlet form and in the permanent form in the bound volume of its reports, show plaintiff as one of the attorneys for the Short Line Railways.

I am unable to see that any actual damage was suffered by plaintiff. And counsel in his opening statement carefully refrained from stating that any damage was suffered.

The rule is thus stated in 13 C. J. 613:

“The general rule is that rescission will not be permitted for a slight or casual breach of the contract but only for such breaches as are so substantial and fundamental as to defeat the object of the parties in making the agreement.”

To the same effect is 9 C. J. 1181, where the cases dealing with the equitable right of rescission are considered.

See

Pickens County v. National Surety Co., 14 F. (2d) 758 at 762.

Beattie v. Friddle, 229 Ky. at 363.

Speed v. Bailey, 153 Md. 655.

Dold Packing Co. v. Doermann, 293 Fed. at 327.

Putnam City Co. v. Minnetonka Lbr. Co., 95 Okla. 149.

3 Williston on Contracts, sec. 1290.

Plaintiff's counsel contend that whether the breach complained of is material or essential is a question of fact which must be submitted to the jury.

But in my judgment it is so clear that the alleged breach was not a material one that the Court may properly pass on this as a matter of law. This is the view taken by the Court of Appeals in Maryland in *Speed v. Bailey, supra*, 153 Md. at 661.

November 4, 1931.

JESSE C. ADKINS,
Justice.

Supreme Court of the District of Columbia.

Wednesday, November 4, 1931.

Session resumed pursuant to adjournment, Mr. Justice Adkins, presiding.

* * * * *

Come again the parties hereto in manner as aforesaid and the same jury that was respited yesterday and after this cause is heard and given to the jury in their charge they upon their oath say they find for the defendants by the direction of the court.

Tuesday, November 10, 1931.

Session resumed pursuant to adjournment, Mr. Justice Adkins presiding.

* * * * *

It appearing under rule of court that judgment should now be entered on the verdict it is so ordered.

Wherefore it is considered that plaintiff take nothing by this action that defendants go hence without day be for nothing held and recover of plaintiff herein their costs of defense to be taxed by the clerk and have execution thereof.

To the foregoing judgment the plaintiff by his attorney of record notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

November 16, 1931.—\$50 deposited by Cook as cost.

Assignment of Errors.

Filed November 30, 1931.

* * * * *

Now comes Halsey McGovern, the appellant in the above-entitled cause, by his attorneys, and assigns as errors in the above-entitled cause, the following:

The Court erred:

(1) In granting defendants' motion for a directed verdict on plaintiff's opening statement.

(2) In directing a verdict for defendants.

P. M. COOK,
L. HAROLD SOTHORON,
Attorneys for the Plaintiff.

Memorandum.

November 30, 1931.—Proposed Bill of Exceptions and Notice filed.

20 *Motion for Leave to Withdraw Funds from Registry.*

Filed December 14, 1931.

* * * * *

Now comes the plaintiff in the above entitled cause, by his attorneys, and moves the Court for leave to withdraw from the Registry of the Court the sum of Two Thousand Two Hundred Eight and 22/100 (\$2,208.22) Dollars, deposited therein by the defendants on the 25th day of March, 1931, in this cause.

P. M. COOK,
L. HAROLD SOTHORON,
Attorneys for the Plaintiff.

Approved.

WALTER C. CLEPHANE,
Attorney for the Defendant Moultrie Hitt.

GILBERT L. HALL,
Attorney for the Defendant Ben B. Cain.

J. WILMER LATIMER,
Attorney for the Defendant Bird M. Robinson.

Supreme Court of the District of Columbia.

Monday, December 14, 1931.

Session resumed pursuant to adjournment, Mr. Chief Justice Wheat presiding.

* * * * *

Upon consideration of the motion filed herein for leave to withdraw funds from the Registry of this Court, it is ordered that said motion be and the same is hereby granted and the plaintiff is granted leave to withdraw Two Thousand Two Hundred Eight Dollars and Twenty-two Cents (\$2,208.22) deposited therein by the defendants on the 25th day of March, 1931.

21

Memorandum.

December 16, 1931.—\$2,186.14 paid to Halsey McGovern by Registry check #1742.

Supreme Court of the District of Columbia.

Saturday, January 2, 1932.

Session resumed pursuant to adjournment, Mr. Justice Adkins presiding.

* * * * *

Comes now the parties hereto, by their respective attorneys of record, whereupon, the Bill of Exceptions, taken at the trial of this cause is submitted to the court this 2nd day of January 1932, and thereupon, is signed and made of record, nunc pro tunc.

Plaintiff's Designation of Record.

Filed November 30, 1931.

* * * * *

Now comes Halsey McGovern, the appellant in the above-entitled cause, by his attorneys, and designates the parts

of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal; namely:

1. Declaration and Particulars of Demand.
2. Plea of defendant Bird M. Robinson.
3. Plea of defendant Ben B. Cain.
4. Plea of defendant Moultrie Hitt.
5. Amended replication to plea of defendant Moultrie Hitt.
6. Rejoinder of defendant Moultrie Hitt.
7. Memorandum of Mr. Justice Adkins granting motion for directed verdict on opening statement.
8. Minute entry of verdict.
9. Minute entry of judgment.
10. Memorandum of appeal in open court and fixing of undertaking on appeal.
11. Memorandum of filing of undertaking.
12. Assignment of errors.
13. Bill of exceptions.
14. Together with a copy of this designation.

P. M. COOK,
L. HAROLD SOTHORON,
Attorneys for the Plaintiff, Appellant.

Service of a copy of the foregoing Designation of the Record is acknowledged this 30th day of November, 1931.

WALTER C. CLEPHANE,
Attorney for the Defendant Moultrie Hitt.

J. WILMER LATIMER,
Attorney for the Defendant Ben B. Cain.

GILBERT L. HALL,
Attorney for the Defendant Bird M. Robinson.

23 *Defendants' Designation of Record.*

Filed December 5, 1931.

* * * * *

Come now the defendants, appellees in the above entitled cause, by their respective attorneys, and designate the following parts of the Record which they desire to have in-

cluded in the transcript for the Court of Appeals, which parts have not been included in the Designation filed by the plaintiff, to wit:

Exhibit A to plea of defendant Hitt;
Rejoinders of defendants Robinson and Cain;
Joint and several plea of defendants puis darrein continuance;
Replication to plea puis darrein continuance;
This counter-designation.

WALTER C. CLEPHANE,
Atty. for Defendant Hitt.

J. WILMER LATIMER,
C.,
Atty. for Defendant Robinson.

GILBERT L. HALL,
C.,
Atty. for Defendant Cain.

Service of a copy of the foregoing counter-designation of the record is acknowledged this 5th day of December, 1931.

P. M. COOK,
L. HAROLD SOTHORON,
Attorneys for Plaintiff.

24 *Defendants' Additional Designation of Record.*

Filed December 17, 1931.

* * * * *

Come now the defendants, appellees in the above entitled cause, by their respective attorneys, and designate the following additional parts of the record which they desire to have included in the Transcript for the Court of Appeals, to wit:

Motion of plaintiff for leave to withdraw fund from the Registry of the Court;
Order granting leave to withdraw said fund;
Notation of withdrawal of said fund.

These parts of the record were not included in the designation formerly filed by the defendants, for the reason that

the proceedings hereinabove mentioned have occurred since the defendants' designation was filed.

WALTER C. CLEPHANE,
Atty. for Defendant Hitt.
 J. WILMER LATIMER,
 C.,
Atty. for Defendant Robinson.
 GILBERT L. HALL,
 C.,
Atty. for Defendant Cain.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 76058 at Law, wherein Halsey McGovern is Plaintiff and Moultrie Hitt et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of March, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

26 In the Supreme Court of the District of Columbia.

Law. No. 76058.

HALSEY MCGOVERN, Plaintiff,

vs.

MOULTRIE HITT, BEN B. CAIN, and BIRD M. ROBINSON,
 Defendants.

Notice.

To Walter C. Clephane, Esq.; J. Wilmer Latimer, Esq.;
 Gilbert L. Hall, Esq., attorneys for the defendants:

Please take notice that the within Bill of Exceptions will be called to the attention of and submitted to the Court

cluded in the transcript for the Court of Appeals, which parts have not been included in the Designation filed by the plaintiff, to wit:

Exhibit A to plea of defendant Hitt;
Rejoinders of defendants Robinson and Cain;
Joint and several plea of defendants puis darrein continuance;
Replication to plea puis darrein continuance;
This counter-designation.

WALTER C. CLEPHANE,
Atty. for Defendant Hitt.

J. WILMER LATIMER,
C.,
Atty. for Defendant Robinson.

GILBERT L. HALL,
C.,
Atty. for Defendant Cain.

Service of a copy of the foregoing counter-designation of the record is acknowledged this 5th day of December, 1931.

P. M. COOK,
L. HAROLD SOTHORON,
Attorneys for Plaintiff.

24 *Defendants' Additional Designation of Record.*

Filed December 17, 1931.

* * * * *

Come now the defendants, appellees in the above entitled cause, by their respective attorneys, and designate the following additional parts of the record which they desire to have included in the Transcript for the Court of Appeals, to wit:

Motion of plaintiff for leave to withdraw fund from the Registry of the Court;
Order granting leave to withdraw said fund;
Notation of withdrawal of said fund.

These parts of the record were not included in the designation formerly filed by the defendants, for the reason that

the proceedings hereinabove mentioned have occurred since the defendants' designation was filed.

WALTER C. CLEPHANE,
Atty. for Defendant Hitt.

J. WILMER LATIMER,
C.,
Atty. for Defendant Robinson.

GILBERT L. HALL,
C.,
Atty. for Defendant Cain.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 76058 at Law, wherein Halsey McGovern is Plaintiff and Moultrie Hitt et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of March, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

26 In the Supreme Court of the District of Columbia.

Law. No. 76058.

HALSEY MCGOVERN, Plaintiff,

vs.

MOULTRIE HITT, BEN B. CAIN, and BIRD M. ROBINSON,
Defendants.

Notice.

To Walter C. Clephane, Esq.; J. Wilmer Latimer, Esq.;
Gilbert L. Hall, Esq., attorneys for the defendants:

Please take notice that the within Bill of Exceptions will be called to the attention of and submitted to the Court

on January 6th, 1932, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for the purpose of having same signed and sealed by the Court.

P. M. COOK,
L. HAROLD SOTHORON,
Attorneys for the Plaintiff.

Service of the foregoing notice and copy of said Bill of Exceptions acknowledged this 30th day of November, 1931.

WALTER C. CLEPHANE,
Attorney for the Defendant Moultrie Hitt.

J. WILMER LATIMER,
Attorney for the Defendant Ben B. Cain.

GILBERT L. HALL,
Attorney for the Defendant Bird M. Robinson.

27 In the Supreme Court of the District of Columbia.

Law. No. 76058.

HALSEY MCGOVERN, Plaintiff,

vs.

MOULTRIE HITT, BEN B. CAIN, and BIRD M. ROBINSON,
Defendants.

Bill of Exceptions.

Be it remembered, that at the trial of this case before Mr. Justice Adkins and a jury duly impaneled and sworn to try the issues herein, which trial began on November 3, 1931, and thereafter was further proceeded with, P. Michael Cook, attorney for the plaintiff, made an opening statement as follows:

“May it please the court, and gentlemen of the jury, this is a suit by the plaintiff against the three defendants for services in handling a railway case before the Interstate Commerce Commission.

“We will show by the evidence that we will produce before you that early in 1925 the defendant Robinson, as president of an association known as the American Short Line Railroad Association, solicited the members of his organization to enter into contracts with him for handling a railway mail pay case before the Interstate Commerce Commission.

“These contracts authorized him to select counsel to handle this case in cooperation with a committee to be appointed by himself.

“We will further show that he appointed the other two defendants, Ben B. Cain, who was then the general counsel of that association, and Moultrie Hitt, who was then his assistant, to serve as counsel and attorney, respectively, to handle this railway mail pay case.

28 “This appointment, we will show, was subsequently confirmed by the committee selected by Mr. Robinson.

“We will further show that about June or July, 1925, the defendant Hitt approached the plaintiff, who was a man of some 25 years' experience as a rate and traffic expert with considerable practice before the Interstate Commerce Commission and various State commissions, to associate with himself the defendant Hitt in the handling of rate and traffic cases. As a result of these conferences, on or about July 1, 1925, the defendant Hitt and the plaintiff entered into an agreement whereby the plaintiff was to furnish consulting and advisory service to the defendant Hitt and to the defendants Cain and Robinson and members of their organization, the American Short Line Railroad Association, in return for which the plaintiff McGovern was to be paid a retainer of \$300 a month for this consulting and advisory service.

“It was also agreed between these two that at the end of a year they would enter into a permanent partnership for handling rate and traffic problems.

“We will further show that shortly after that the plaintiff went with the defendants' organization and moved into their suite, where the defendants Cain, Robinson and Hitt were members of this organization; that shortly after he went there, on August 1, 1925, the defendant Hitt turned over to the plaintiff this railway mail pay case to handle before the Interstate Commerce Commission. Although this case was not within the terms of his contract, we will show that the plaintiff went ahead and handled this case before the Interstate Commerce Commission, assuming that he would be paid adequate compensation and, by agreement or contract with the defendant Hitt, would enter into a permanent partnership at the end of the year.

29 “We will show that the plaintiff actively engaged on that work and that throughout his engagement he was assured by the defendants Hitt, Cain and Robinson, that he would be adequately compensated for his services in handling that case.

 “ We will further show that at the end of the year, on July 31, 1926, the defendant Hitt would not enter into the permanent partnership arrangement with the plaintiff, and, as a matter of fact, he put it out of his power to do so by making other arrangements.

 “ We will show that before the expiration of the oral contract, on July 31, 1926, and for many months after that, the plaintiff had numerous conferences and negotiations with the three defendants, and also with Hitt individually, he acting as the agent for and on behalf of the defendants Cain and Robinson. There were constant negotiations looking to the plaintiff's adequate and reasonable compensation for services in handling this railway mail pay case. The only thing that the plaintiff could ever get after about three or four months of conferences was that he was to be adequately compensated. That is the only assurance he could get.

 “ Finally, in March of 1927 the plaintiff, having despaired of getting any definite agreement for adequate or reasonable compensation for handling such a stupendous case, threatened to leave the office and, in fact, did leave the suite occupied by the three defendants, and opened his own office in the Mills Building. He refused longer to have any further connection with the case. Thereupon, the defendants approached him again and begged him and pleaded with him to continue with the case, because it was at such a stage that no one else could complete it; and they offered him as adequate compensation for completing this railway mail pay case the sum of \$5,000. The plaintiff turned on his heel and walked out and would not consider it.

30 “ We will show you that as the result of further negotiations, finally the plaintiff, rather than leave these 173 railroads in a position where they probably would not get anything from the Interstate Commerce Commission, agreed with the defendant Hitt, acting for and on behalf of Cain and Robinson, that he would accept \$5,000 and complete this case, but on one important condition, and that was that it was to be his case; that he was to get full

credit for it before the Interstate Commerce Commission.

“We will show that that was the primary inducement for him to accept such an insignificant sum as \$5,000 for handling a case involving nearly \$2,000,000.

“That as a result of these conferences they entered into a written contract on April 25, 1927, (which contract is Exhibit A of Plea of defendant Hitt) between the plaintiff and the defendant Hitt who, as the contract states, was acting on behalf of his associates. Under that contract the defendant Hitt agreed to pay the plaintiff \$5,000 to complete the case, \$2,000 of which was to be contingent upon its successful conclusion. And in that contract we will show was embodied their agreement that the plaintiff was to get full credit for this case before the Interstate Commerce Commission, in the following language:

“ ‘The party of the second part’—

“ ‘Meaning the plaintiff—

“ ‘To appear of record and on brief.’

“We will further show that on May 1, 1927, the plaintiff went into his own office in the Mills Building and from then on devoted his time exclusively to the handling of this railway mail pay case before the Interstate Commerce Commission.

“We will show that during all this period he was handling this case that he handled some four thousand pieces of correspondence; that he handled over 400,000 forms on which these railroads compiled the information upon which he was to base his evidence in the case before the Interstate Commerce Commission. We will show that he
31 worked a total of 27 months, day and night, Sundays and holidays, in the preparation of this case.

“We will show that he personally prepared the initial brief; that all but probably 20 pages was, every word of it, his language. We will show that he prepared some 60 exhibits on large sheets of paper 17 by 17 inches, containing detailed data upon which the Commission would have reasonable grounds to grant an increase in rates.

“We will show that the benefits accruing to these 173 railroads was over a million and a half dollars, and that as result of his services the defendants have collected to date approximately \$300,000 as fees, with \$50,000 yet to be collected; that the plaintiff has only received to date \$3,000 as the result of his services.

“We will show that the plaintiff actively engaged
29 on that work and that throughout his engagement
he was assured by the defendants Hitt, Cain and
Robinson, that he would be adequately compensated for his
services in handling that case.

“We will further show that at the end of the year, on
July 31, 1926, the defendant Hitt would not enter into the
permanent partnership arrangement with the plaintiff, and,
as a matter of fact, he put it out of his power to do so by
making other arrangements.

“We will show that before the expiration of the oral con-
tract, on July 31, 1926, and for many months after that,
the plaintiff had numerous conferences and negotiations
with the three defendants, and also with Hitt individually,
he acting as the agent for and on behalf of the defendants
Cain and Robinson. There were constant negotiations look-
ing to the plaintiff's adequate and reasonable compensation
for services in handling this railway mail pay case. The
only thing that the plaintiff could ever get after about three
or four months of conferences was that he was to be ade-
quately compensated. That is the only assurance he could
get.

“Finally, in March of 1927 the plaintiff, having despaired
of getting any definite agreement for adequate or reason-
able compensation for handling such a stupendous case,
threatened to leave the office and, in fact, did leave the suite
occupied by the three defendants, and opened his own office
in the Mills Building. He refused longer to have any
further connection with the case. Thereupon, the defend-
ants approached him again and begged him and pleaded
with him to continue with the case, because it was at such
a stage that no one else could complete it; and they offered
him as adequate compensation for completing this railway
mail pay case the sum of \$5,000. The plaintiff turned on
his heel and walked out and would not consider it.

“We will show you that as the result of further negotia-
tions, finally the plaintiff, rather than leave these 173
30 railroads in a position where they probably would
not get anything from the Interstate Commerce Com-
mission, agreed with the defendant Hitt, acting for and on
behalf of Cain and Robinson, that he would accept \$5,000
and complete this case, but on one important condition, and
that was that it was to be his case; that he was to get full

credit for it before the Interstate Commerce Commission.

“We will show that that was the primary inducement for him to accept such an insignificant sum as \$5,000 for handling a case involving nearly \$2,000,000.

“That as a result of these conferences they entered into a written contract on April 25, 1927, (which contract is Exhibit A of Plea of defendant Hitt) between the plaintiff and the defendant Hitt who, as the contract states, was acting on behalf of his associates. Under that contract the defendant Hitt agreed to pay the plaintiff \$5,000 to complete the case, \$2,000 of which was to be contingent upon its successful conclusion. And in that contract we will show was embodied their agreement that the plaintiff was to get full credit for this case before the Interstate Commerce Commission, in the following language:

“ ‘The party of the second part’—

“ ‘Meaning the plaintiff—

“ ‘To appear of record and on brief.’

“We will further show that on May 1, 1927, the plaintiff went into his own office in the Mills Building and from then on devoted his time exclusively to the handling of this railway mail pay case before the Interstate Commerce Commission.

“We will show that during all this period he was handling this case that he handled some four thousand pieces of correspondence; that he handled over 400,000 forms on which these railroads compiled the information upon which he was to base his evidence in the case before the Interstate Commerce Commission. We will show that he
31 worked a total of 27 months, day and night, Sundays and holidays, in the preparation of this case.

“We will show that he personally prepared the initial brief; that all but probably 20 pages was, every word of it, his language. We will show that he prepared some 60 exhibits on large sheets of paper 17 by 17 inches, containing detailed data upon which the Commission would have reasonable grounds to grant an increase in rates.

“We will show that the benefits accruing to these 173 railroads was over a million and a half dollars, and that as result of his services the defendants have collected to date approximately \$300,000 as fees, with \$50,000 yet to be collected; that the plaintiff has only received to date \$3,000 as the result of his services.

“We will show that the plaintiff actively engaged
29 on that work and that throughout his engagement
he was assured by the defendants Hitt, Cain and
Robinson, that he would be adequately compensated for his
services in handling that case.

“We will further show that at the end of the year, on
July 31, 1926, the defendant Hitt would not enter into the
permanent partnership arrangement with the plaintiff, and,
as a matter of fact, he put it out of his power to do so by
making other arrangements.

“We will show that before the expiration of the oral con-
tract, on July 31, 1926, and for many months after that,
the plaintiff had numerous conferences and negotiations
with the three defendants, and also with Hitt individually,
he acting as the agent for and on behalf of the defendants
Cain and Robinson. There were constant negotiations look-
ing to the plaintiff's adequate and reasonable compensation
for services in handling this railway mail pay case. The
only thing that the plaintiff could ever get after about three
or four months of conferences was that he was to be ade-
quately compensated. That is the only assurance he could
get.

“Finally, in March of 1927 the plaintiff, having despaired
of getting any definite agreement for adequate or reason-
able compensation for handling such a stupendous case,
threatened to leave the office and, in fact, did leave the suite
occupied by the three defendants, and opened his own office
in the Mills Building. He refused longer to have any
further connection with the case. Thereupon, the defend-
ants approached him again and begged him and pleaded
with him to continue with the case, because it was at such
a stage that no one else could complete it; and they offered
him as adequate compensation for completing this railway
mail pay case the sum of \$5,000. The plaintiff turned on
his heel and walked out and would not consider it.

“We will show you that as the result of further negotia-
tions, finally the plaintiff, rather than leave these 173
30 railroads in a position where they probably would
not get anything from the Interstate Commerce Com-
mission, agreed with the defendant Hitt, acting for and on
behalf of Cain and Robinson, that he would accept \$5,000
and complete this case, but on one important condition, and
that was that it was to be his case; that he was to get full

credit for it before the Interstate Commerce Commission.

“We will show that that was the primary inducement for him to accept such an insignificant sum as \$5,000 for handling a case involving nearly \$2,000,000.

“That as a result of these conferences they entered into a written contract on April 25, 1927, (which contract is Exhibit A of Plea of defendant Hitt) between the plaintiff and the defendant Hitt who, as the contract states, was acting on behalf of his associates. Under that contract the defendant Hitt agreed to pay the plaintiff \$5,000 to complete the case, \$2,000 of which was to be contingent upon its successful conclusion. And in that contract we will show was embodied their agreement that the plaintiff was to get full credit for this case before the Interstate Commerce Commission, in the following language:

“ ‘The party of the second part’—

“ ‘Meaning the plaintiff—

“ ‘To appear of record and on brief.’

“We will further show that on May 1, 1927, the plaintiff went into his own office in the Mills Building and from then on devoted his time exclusively to the handling of this railway mail pay case before the Interstate Commerce Commission.

“We will show that during all this period he was handling this case that he handled some four thousand pieces of correspondence; that he handled over 400,000 forms on which these railroads compiled the information upon which he was to base his evidence in the case before the Interstate Commerce Commission. We will show that he
31 worked a total of 27 months, day and night, Sundays and holidays, in the preparation of this case.

“We will show that he personally prepared the initial brief; that all but probably 20 pages was, every word of it, his language. We will show that he prepared some 60 exhibits on large sheets of paper 17 by 17 inches, containing detailed data upon which the Commission would have reasonable grounds to grant an increase in rates.

“We will show that the benefits accruing to these 173 railroads was over a million and a half dollars, and that as result of his services the defendants have collected to date approximately \$300,000 as fees, with \$50,000 yet to be collected; that the plaintiff has only received to date \$3,000 as the result of his services.

“We will show that the plaintiff actively engaged
29 on that work and that throughout his engagement
he was assured by the defendants Hitt, Cain and
Robinson, that he would be adequately compensated for his
services in handling that case.

“We will further show that at the end of the year, on
July 31, 1926, the defendant Hitt would not enter into the
permanent partnership arrangement with the plaintiff, and,
as a matter of fact, he put it out of his power to do so by
making other arrangements.

“We will show that before the expiration of the oral con-
tract, on July 31, 1926, and for many months after that,
the plaintiff had numerous conferences and negotiations
with the three defendants, and also with Hitt individually,
he acting as the agent for and on behalf of the defendants
Cain and Robinson. There were constant negotiations look-
ing to the plaintiff's adequate and reasonable compensation
for services in handling this railway mail pay case. The
only thing that the plaintiff could ever get after about three
or four months of conferences was that he was to be ade-
quately compensated. That is the only assurance he could
get.

“Finally, in March of 1927 the plaintiff, having despaired
of getting any definite agreement for adequate or reason-
able compensation for handling such a stupendous case,
threatened to leave the office and, in fact, did leave the suite
occupied by the three defendants, and opened his own office
in the Mills Building. He refused longer to have any
further connection with the case. Thereupon, the defend-
ants approached him again and begged him and pleaded
with him to continue with the case, because it was at such
a stage that no one else could complete it; and they offered
him as adequate compensation for completing this railway
mail pay case the sum of \$5,000. The plaintiff turned on
his heel and walked out and would not consider it.

“We will show you that as the result of further negotia-
tions, finally the plaintiff, rather than leave these 173
30 railroads in a position where they probably would
not get anything from the Interstate Commerce Com-
mission, agreed with the defendant Hitt, acting for and on
behalf of Cain and Robinson, that he would accept \$5,000
and complete this case, but on one important condition, and
that was that it was to be his case; that he was to get full

credit for it before the Interstate Commerce Commission.

“We will show that that was the primary inducement for him to accept such an insignificant sum as \$5,000 for handling a case involving nearly \$2,000,000.

“That as a result of these conferences they entered into a written contract on April 25, 1927, (which contract is Exhibit A of Plea of defendant Hitt) between the plaintiff and the defendant Hitt who, as the contract states, was acting on behalf of his associates. Under that contract the defendant Hitt agreed to pay the plaintiff \$5,000 to complete the case, \$2,000 of which was to be contingent upon its successful conclusion. And in that contract we will show was embodied their agreement that the plaintiff was to get full credit for this case before the Interstate Commerce Commission, in the following language:

“ ‘The party of the second part’—

“ ‘Meaning the plaintiff—

“ ‘To appear of record and on brief.’

“We will further show that on May 1, 1927, the plaintiff went into his own office in the Mills Building and from then on devoted his time exclusively to the handling of this railway mail pay case before the Interstate Commerce Commission.

“We will show that during all this period he was handling this case that he handled some four thousand pieces of correspondence; that he handled over 400,000 forms on which these railroads compiled the information upon which he was to base his evidence in the case before the Interstate Commerce Commission. We will show that he
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“We will show that he personally prepared the initial brief; that all but probably 20 pages was, every word of it, his language. We will show that he prepared some 60 exhibits on large sheets of paper 17 by 17 inches, containing detailed data upon which the Commission would have reasonable grounds to grant an increase in rates.

“We will show that the benefits accruing to these 173 railroads was over a million and a half dollars, and that as result of his services the defendants have collected to date approximately \$300,000 as fees, with \$50,000 yet to be collected; that the plaintiff has only received to date \$3,000 as the result of his services.

“We will further show that in December of 1927 the defendant Hitt approached the plaintiff and requested him to perform some service that was not within the terms of the contract and which was practically impossible to perform. We will show that. That thereupon the defendant Hitt deliberately—and I will prove that he did it deliberately—left the plaintiff’s name off the second brief filed with the Interstate Commerce Commission, and thereby broke the contract that his name was to appear of record and on brief.

“We will show that all throughout these negotiations the defendants Cain and Robinson did nothing towards handling this case, either in the way of advice or assistance; that the defendant Hitt rendered only nominal service; that all the work was done by the plaintiff McGovern.

“We will show that throughout the handling of this case the defendants Robinson and Cain were fully aware of what the plaintiff McGovern was doing with respect to this mail pay case; that they specifically approved of it; they knew that he was doing it and approved of everything that he did, and they got the benefits of his services.

32 “We will further show that the plaintiff, as I said before, has only received \$3,000 for his services. We will show that the reasonable value of his services is approximately \$200,000; and we will show that he has not been paid reasonable value for his services.

“And with these facts before you, we shall expect a favorable verdict.”

Thereupon the following ensued:

The Court: “Before you do that, may I ask counsel for the plaintiff one or two questions, with the understanding that your answers, Mr. Cook, are to be treated as a part of your opening.

“Do I understand that the only proof you rely upon is the failure to put the plaintiff’s name on the second brief?”

Mr. Cook: “That is it, exactly.”

The Court: “Would you be willing to state a little more in detail just the circumstances of filing the briefs, the first brief and the second brief?”

Mr. Cook: “The circumstances surrounding the filing of them?”

The Court: “Yes.”

Mr. Cook: “I shall be glad to, your Honor.

"After the plaintiff had completed the preparation of this case he then prepared the testimony. Under the practice before the Interstate Commerce Commission the attorneys or the rate experts can write out the questions and answers before the case goes to trial, and the questions are read by the attorney and the answers are read by the witness on the stand. It is all prepared in advance. It is called "canned" testimony. He prepared that testimony, and the testimony was given on the stand for four days at Atlantic City, July 5, 6, 7 and 8, 1927.

33 "When he came back from Atlantic City he immediately wrote the brief based on his testimony that he had already prepared, and on the exhibits, the 60 exhibits that he had prepared. Out of that he gathered an argument which was put in a printed brief. That brief was filed with the Interstate Commerce Commission as soon as it was completed and printed. On that brief appeared the names of Moultrie Hitt, Ben Cain and Halsey McGovern. That is his brief.

"After that brief was filed the case was set down for argument, and as was usual in these cases there was a proposed report filed by one of the Examiners; that is, the Examiner put out a report as to the findings that he proposed to make. Under the practice before the Interstate Commerce Commission the expert or the counsel who is handling the case is authorized to file exceptions to that proposed report. If he does not file exceptions, then that proposed report becomes final; it becomes the report of the Commission.

"So in this case, the defendant Hitt filed an exceptions brief on about June 26, 1928, in which he took exception to the proposed report of the Examiner. That was the second brief. On that brief appear the names of Moultrie Hitt and Ben B. Cain. Mr. McGovern's name was not on it.

"That was the breach which we are alleging, that his name was left off that second brief, the exceptions brief filed with the Interstate Commerce Commission."

The Court: "May I ask whether the plaintiff had done any work on the preparation of that brief?"

Mr. Cook: "We expect to show your Honor and the gentlemen of the jury that the plaintiff did consult with and advice the defendant Hitt as to the preparation of the

exceptions brief, and we expect to show, further, that more than 50 per cent of the exceptions brief was lifted bodily from the original brief prepared by the plaintiff."

34 The Court: "Is it fair to ask you whether or not the plaintiff's name appears in the case as counsel of record and whether it appears in the report of the Interstate Commerce Commission?"

Mr. Cook: "I will be very glad to answer that. We will show that the defendant Hitt, at the time of the hearing at Atlantic City, personally entered the appearance of the plaintiff McGovern of record before the Interstate Commerce Commission as one of the counsel that was to handle the case. He also entered the appearance of himself and Ben B. Cain. Mr. Robinson did not appear. He has never appeared in the case at all.

"We will show further that in the final report of the Commission appeared the names of McGovern, Hitt and Cain as counsel for these 173 railroads, the Associated Short Line Railroads, as they were called. That was taken from the original entries of the appearances by the defendant Hitt of record before the Interstate Commerce Commission."

The Court: "Thank you."

Thereupon counsel for defendant submitted to counsel for plaintiff a printed document labeled "Report of the Commission on Further Hearing", and asked if that was the document referred to by him and was the final decision in the case, to which counsel for plaintiff responded that it was. The first page of this document was in the words and figures following:

(Here follows Defendants' Exhibit 1, side folios 35 and 36.)

37 The document was then examined by the court, after having been marked for identification as "Defendants' Exhibit No. 1".

Thereupon counsel for each of the defendants orally moved for a directed verdict in favor of the defendants upon the plaintiff's opening statement.

During the course of the argument upon these motions, it was agreed by counsel, for the purpose of these motions, that if the motion for a directed verdict should be granted as to the defendant Hitt, it should also be granted as to

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INTERSTATE COMMERCE COMMISSION

No. 9200

RAILWAY MAIL PAY

Submitted June 29, 1928. Decided July 10, 1928

1. Upon reexamination, rates of mail pay found to be not fair and reasonable.
2. Reasonable compensation from the dates applications were filed or, where not filed, from July 24, 1925, the date of the order for reexamination, to the date the increased rates established herein become effective, fixed at 15 per cent in addition to the compensation paid or accrued at the established rates in effect during said periods; and for separately operated short lines not exceeding 100 miles in length, 80 per cent in addition to the compensation paid or accrued at the established rates for such lines.
3. Increased rates established as fair and reasonable for service on and after August 1, 1928.
4. The record does not furnish an adequate basis for establishing group rates upon a territorial basis even if a change from the present system to a group system were considered desirable.
5. Request for the establishment of rates for additional units of space graded in steps of 3 feet, granted.
6. Rule with respect to authorizations of larger units when smaller regularly authorized units are exceeded on 50 per cent or more of the trips in any calendar month, modified.
7. Rule for computing miles of service of storage cars and lesser units, modified.
Former reports 56 I. C. C. 1, 85 I. C. C. 157, 95 I. C. C. 204, 96 I. C. C. 43, 104 I. C. C. 521, and 109 I. C. C. 13.

Fred H. Wood, J. R. Bell, Henry Wolf Bicklé, Clyde Brown, A. H. Elder, P. F. Gault, R. V. Fletcher, Charles J. Rixey, B. W. Scandrett, Elmer Westlake, Cravath, Henderson & De Gersdorff, and G. E. Cooper for Class I and certain other railroads; *Ben B. Cain, Moultrie Hitt, and Halsey McGovern* for certain short-line railroads; *Charles H. Blatchford* for New England railroads; *Henry J. Hart* for Bangor & Aroostook Railroad; *A. R. Yarborough* for Kanawah Central Railway and Strouds Creek & Muddlety Railroad; *G. F. Snyder* for Canadian Pacific Railway (New England lines); and *J. N. Flowers* for Gulf, Mobile & Northern Railroad and Birmingham & Northwestern Railway.

Joseph Stewart, special assistant to Attorney General, for Postmaster General.

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions were filed by the parties to the report proposed by the examiner and oral argument was had. Our conclusions differ, in some respects, from those proposed by him.

Application for reexamination of rates of pay for transportation of mail matter was filed May 9, 1925, by 198 carriers, including substantially all Class I roads. On July 16, 1925, a similar application was filed by 87 short-line railroads, members of the American Short Line Railroad Association. Prior to the filing of the latter application, we had reopened the case on June 8, 1925, for reexamination with respect to rates of mail pay received by certain lines in New England upon application filed May 6, 1925. Applications had also been filed by other railroads. Upon representation by the Postmaster General that the proceeding should be broadened so as to include all roads carrying mail, we entered our order of July 24, 1925, reopening the proceeding as to all such roads, other than urban and interurban electric lines. Some 44 short-line railroads in intermountain and Pacific coast territory, whose rates of mail pay were dealt with in separate proceedings, were excluded.

The case as presented is divided into four parts: First, rates of mail pay on 148 Class I roads and 13 subsidiaries, represented by a committee on railway-mail pay, hereinafter referred to as the mail-pay committee; second, rates of pay on 11 New England roads; third, rates of pay on 194 short lines, of which 172 are represented by the American Short Line Association, which also represents the Georgia & Florida Railway, a Class I road, and 19 by the mail-pay committee; and fourth, proposals of the Post Office Department, hereinafter referred to as the department, with respect to grouping the carriers into mail-pay groups, changes in the present space units, and changes in regulations governing authorization of space. Excluding the 11 New England lines, the total number of roads which furnished complete data, as classified by the department, was 395, of which 209 were represented by the mail-pay committee, 142 by the American Short Line Association, 2 by individual counsel, and 42 were not represented. Other roads, 149 in number, mostly short lines, either furnished no space or financial data or furnished incomplete data.

The rates of mail pay now in effect on lines of applicants, except New England lines, were established in *Railway Mail Pay*, 56 I. C. C. 1, decided December 23, 1919. The space and other data in that case were obtained during a test period of 35 days in 1917. Rates were fixed for the period November 1, 1916, to January 1, 1918. These were increased 25 per cent, effective the latter date.

The mail-pay committee submitted testimony and exhibits to show that the volume and weight of mail transported and the average loading in the several units of space have greatly increased; and that the rates do not make proper allowance therefor, nor for the greater trucking and handling services at terminals. To determine the

MAY 19 1932

Henry W. Hodges

Court of Appeals, District of Columbia CLERK

JANUARY TERM—1932

No. 5621

HALSEY McGOVERN, APPELLANT

vs.

MOULTRIE HITT, BEN B. CAIN, AND BIRD M.
ROBINSON, APPELLEES

BRIEF ON BEHALF OF APPELLANT

P. MICHAEL COOK,
L. HAROLD SOTHORON,
Commercial National Bank Bldg.
Attorneys for the Appellant.

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Court of Appeals, District of Columbia

JANUARY TERM—1932

No. 5621

HALSEY McGOVERN, APPELLANT

vs.

MOULTRIE HITT, BEN B. CAIN, AND BIRD M.
ROBINSON, APPELLEES

BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE

The appellant, plaintiff below, filed suit in the Supreme Court of the District of Columbia against Moultrie Hitt, Ben B. Cain, and Bird M. Robinson, for the reasonable value of his services in the sum of \$200,000.00, in handling the Railway Mail Pay Case, I. C. C. Docket No. 9200, before the Interstate Commerce Commission.

The defendant Bird M. Robinson in his plea admitted that the plaintiff rendered services in said case, but denied that such services were rendered at his instance or request.

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The defendant Bird M. Robinson in his plea admitted that the plaintiff rendered services in said case, but denied that such services were rendered at his instance or request.

The defendant Ben B. Cain in his plea admitted that the plaintiff rendered certain assistance in said case, but averred that such services were rendered at the instance and under contract with the defendant Moultrie Hitt.

The defendant Moultrie Hitt in his plea admitted that the plaintiff assisted in the preparation of this case, but averred that the services were rendered pursuant to a written contract attached to and made a part of his plea.

The plaintiff, for replication to the plea of the defendant Moultrie Hitt, admitted entering into the written contract referred to therein, but averred that the defendant Moultrie Hitt wilfully and arbitrarily breached one of the material provisions of that contract, which provided "party of the second part (plaintiff) to appear of record and on brief", in that the defendant wilfully omitted and refused to put the plaintiff's name on the second and final brief filed in the said Mail Pay Case.

The defendant Moultrie Hitt's rejoinder denied the affirmative averments in plaintiff's replication, and upon these pleadings issue was joined.

This case came on for trial, and at the conclusion of plaintiff's opening statement, the defendants each moved for a directed verdict, and, after argument by counsel, the Court granted the motion and directed the jury to return a verdict for the defendants, and exception was duly noted and taken, and an appeal prosecuted to this Court.

The opening statement of the plaintiff stated in effect (rec. page 22-26) that early in 1925 the defendant Robinson, as President of the American Short Line Railroad Association, solicited the members of his organization to enter into contracts with him for handling a Railway Mail Pay Case before the Interstate Commerce Commission. These contracts authorized him, together with a committee, to select counsel, and pursuant thereto he appointed the defendants Ben B. Cain, who was general counsel of the association, and Moultrie Hitt, who was his assistant, to serve as counsel and attorney. The defendant Hitt in June or July, 1925, approached the plaintiff, who had some twenty-five years' experience as a rate and traffic expert practicing before the Interstate Commerce Commission, to enter into a contract with him to handle rate and traffic cases. On or about July 1, 1925, the defendant Hitt and the plaintiff entered into an agreement whereby the plaintiff was to furnish consulting and advisory service to the defendants, Hitt, Cain and Robinson, and the members of their association, for which he was to be paid a retainer of \$300.00 per month. On or about August 1, 1925, the defendant Hitt turned over to the plaintiff this Railway Mail Pay Case. This case was not within the terms of his contract, and the plaintiff handled it assuming that he would be paid adequate compensation, and throughout his work thereon, he was assured by the defendants, Hitt, Cain and Robinson, that he would be adequately compensated. When the defendants, in March of 1927, would not enter into any definite agreement with the defendant for reasonable compensation, the plaintiff refused to have any further connection with the case, and definitely refused an offer of \$5,000.00 to complete the case. As a result of further negotiations, the plain-

The defendant Ben B. Cain in his plea admitted that the plaintiff rendered certain assistance in said case, but averred that such services were rendered at the instance and under contract with the defendant Moultrie Hitt.

The defendant Moultrie Hitt in his plea admitted that the plaintiff assisted in the preparation of this case, but averred that the services were rendered pursuant to a written contract attached to and made a part of his plea.

The plaintiff, for replication to the plea of the defendant Moultrie Hitt, admitted entering into the written contract referred to therein, but averred that the defendant Moultrie Hitt wilfully and arbitrarily breached one of the material provisions of that contract, which provided "party of the second part (plaintiff) to appear of record and on brief", in that the defendant wilfully omitted and refused to put the plaintiff's name on the second and final brief filed in the said Mail Pay Case.

The defendant Moultrie Hitt's rejoinder denied the affirmative averments in plaintiff's replication, and upon these pleadings issue was joined.

This case came on for trial, and at the conclusion of plaintiff's opening statement, the defendants each moved for a directed verdict, and, after argument by counsel, the Court granted the motion and directed the jury to return a verdict for the defendants, and exception was duly noted and taken, and an appeal prosecuted to this Court.

The opening statement of the plaintiff stated in effect (rec. page 22-26) that early in 1925 the defendant Robinson, as President of the American Short Line Railroad Association, solicited the members of his organization to enter into contracts with him for handling a Railway Mail Pay Case before the Interstate Commerce Commission. These contracts authorized him, together with a committee, to select counsel, and pursuant thereto he appointed the defendants Ben B. Cain, who was general counsel of the association, and Moultrie Hitt, who was his assistant, to serve as counsel and attorney. The defendant Hitt in June or July, 1925, approached the plaintiff, who had some twenty-five years' experience as a rate and traffic expert practicing before the Interstate Commerce Commission, to enter into a contract with him to handle rate and traffic cases. On or about July 1, 1925, the defendant Hitt and the plaintiff entered into an agreement whereby the plaintiff was to furnish consulting and advisory service to the defendants, Hitt, Cain and Robinson, and the members of their association, for which he was to be paid a retainer of \$300.00 per month. On or about August 1, 1925, the defendant Hitt turned over to the plaintiff this Railway Mail Pay Case. This case was not within the terms of his contract, and the plaintiff handled it assuming that he would be paid adequate compensation, and throughout his work thereon, he was assured by the defendants, Hitt, Cain and Robinson, that he would be adequately compensated. When the defendants, in March of 1927, would not enter into any definite agreement with the defendant for reasonable compensation, the plaintiff refused to have any further connection with the case, and definitely refused an offer of \$5,000.00 to complete the case. As a result of further negotiations, the plain-

tiff, rather than leave the 173 railroads he was representing in a position where they would probably lose the case, agreed with the defendant Hitt, acting on behalf of himself and Cain and Robinson, that he would accept \$5,000.00 to complete the case, but on one important condition, and that was that it was to be his case, that he was to get full credit for it before the Interstate Commerce Commission. This was the primary inducement for him to accept such an insignificant sum as \$5,000 for handling a case involving nearly \$2,000,000.00. The plaintiff and defendant Hitt entered into the written contract of April 25, 1927, under which the plaintiff would receive \$5,000.00, and in this written contract was embodied their agreement that the plaintiff was to get credit for the case, in the following language: "The party of the second part (meaning the plaintiff) to appear of record and on brief." The plaintiff then proceeded to complete the case, and the opening statement stated in detail the time consumed by the plaintiff and the enormous amount of work involved in handling this case, and stated that as a result of the plaintiff's services the defendants had received \$300,000.00 as fees, with \$50,000.00 yet to be collected; that the defendant Hitt deliberately, and it was stated in the opening that the plaintiff would prove he did it deliberately, left the plaintiff's name off the second brief filed with the Interstate Commerce Commission, and thereby broke the contract that his name was to appear of record and on brief. The opening statement concluded that the defendants Cain and Robinson did no work in handling the case, and the defendant Hitt rendered only nominal services; that all the work was done by the plaintiff, but that the defendants specifically approved of everything the plaintiff did; that the plain-

tiff had received only \$3,000.00 for his services; that the reasonable value of his services is approximately \$200,000.00, and that he had not been paid the reasonable value of his services.

ASSIGNMENTS OF ERROR

The two assignments of error (rec. page 17) may be summed up by stating that the Court erred in directing a verdict for the defendants on the plaintiff's opening statement.

ARGUMENT

1. PLAINTIFF HAD A GOOD CAUSE OF ACTION ON A QUANTUM MERUIT.

Unquestionably the plaintiff's declaration set out a good cause of action on a quantum meruit. He alleged the services rendered, the amount to be received by the defendants, that the services were rendered at the special instance and request of the defendants, that the reasonable value of his services was \$200,000.00, and that he had not been paid the reasonable value of his services. There was no demurrer interposed to this declaration.

1-A. Upon Breach of the Contract, Plaintiff Had Election of Three Remedies.

It is well settled that upon breach of a contract, the innocent party has his election of three remedies: (1) he may treat the contract as rescinded and recover

upon quantum meruit; (2) he may keep the contract alive, and at the end of the time specified for performance sue and recover under the contract; and (3) he may bring an action in damages for the breach of the contract. 6 R. C. L. page 1032; Benjamin & Messing on Contracts, 2d Edition, page 362; Clark on Contracts, 3d Edition, page 606; Page on Contracts, sec. 3023, page 5338.

The plaintiff did not have to declare on the contract or for the breach of it, but could sue for the reasonable value of his services. *West v. Bauduit*, 59 App. D. C. 74; *Davidson v. Laughlin*, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. (NS) 579 and note; *Riefkin v. E. I. Dupont, etc. Co.*, 53 App. D. C. 311; *Keedy v. Long*, 71 Md. 395, 5 L. R. A. 759; *United Press Assn. v. National Newspaper Assn.*, 237 F. 547; *Knotts v. Clark Const. Co.*, 249 F. 181, 183; *Blair Engineering Co. v. Page Steel & Wire Co.*, 288 F. 662.

1-B. *Plaintiff was justified in Treating the Contract as Discharged.*

It may be true, as stated by the lower court in its memorandum opinion, that a slight or casual breach of the contract will not permit the innocent party to treat it as rescinded, but that such breaches should be so substantial and fundamental as to defeat the object of the parties in making their agreement.

Page on Contracts, sec. 3240, page 5704, states the rule to be, “* * * a total failure of consideration, a partial failure of a vital term, or the breach of a material precedent covenant, or a concurrent covenant, will operate as a discharge of the contract.* * * If

one of the parties refuses performance, the adversary party may treat the contract as discharged for the purpose of recovering on quasi-contract.”

It may be that if this was a breach of an independent covenant of the contract, it would not warrant the plaintiff in treating the contract as rescinded and suing for the reasonable value of his services. On the other hand, if this was a breach of a dependent covenant, the plaintiff was justified in disregarding the contract and suing on a quantum meruit.

In *Phillips & Colby Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341, 343, the Supreme Court said:

“It is undeniably the general rule that where a specified thing is to be done by one party as the consideration of the thing to be done by the other, that the covenants are mutual and are dependent, if they are to be performed at the same time.”

Whether a promise in a contract is dependent or independent depends primarily on the intention of the parties. *Philadelphia W. & B. R. Co. v. Howard*, 54 U. S. 307, 339; *Pollak v. Brush Electric Assn.*, 128 U. S. 446, 32 L. Ed. 474, 477; *Investors Utility Corporation, et al. v. Challemombe*, 39 S. W. (2d) 175; *El Paso & S. W. R. Co. v. Eiched & Weikel*, 130 S. W. 922; see also note to *Huyett & Smith Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 278.

In the case of *S. S. Thompson Co. v. Atlantic Co.*, 148 Atl. 626, it was stated:

“Chief Justice Ruger said in the body of the Mansfield Case (at page 211 of 102 N. Y., 6 N. E. 388):

“ ‘Is is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes the doing of some act on the part of the other prior thereto, that the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or when recission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned against the defaulting party. *Cross v. Beard*, 26 N. Y. 85, 88.

“ ‘*The meaning of a contract is to be gathered from a consideration of all its provisions, and the inferences naturally derived therefrom as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance.*’ ” (Italics ours.)

The intention of the parties in inserting the clause in the written contract, “The party of the second part to appear of record and on brief”, is clearly shown from the opening statement that this provision in the contract was the primary inducement for the plaintiff to enter into that contract; that it was unquestionably a dependent covenant. Certainly, the opening statement (rec. page 24-25) shows, and it must be taken as true upon demurrer to the opening statement, that the parties to the written contract considered this clause as a most important condition. It certainly indicates that if such a provision had not been incorporated into the written contract, the plaintiff would not have entered into this agreement, and even though it may be considered a partial failure which would not ordinarily give the plaintiff the right to rescind, “where the failure is also a part so essential to the residue that it cannot be reasonably supposed that the

purchaser would have made the contract without it, the contract is dissolved in toto." *South Texas Telephone Co. v. Huntington*, 121 S. W. 242, 249; 104 Tex. 350.

In *Dold Packing Co. v. Doermann*, 293 Fed. at 327, cited by the lower court to show that this breach was a slight or casual one, the court cites Bishop on Contracts, sec. 828, as follows:

"And, in general terms, the doctrine is, that the breach, to justify a rescission, must be of a dependent covenant, or *wilful or in a substantial part comprehending the root of the whole.*" (Italics ours.)

The breach complained of was substantial, but was it *wilful*? The plaintiff's replication, to which was entered a general denial, averred that the defendant Moultrie Hitt wilfully and arbitrarily breached this, which was one of the material provisions of the contract, and the opening statement, (rec. page 26) placed particular emphasis on the fact that it would be proved that the defendant Hitt deliberately breached this provision. In the light of the above, there would seem to be little if any doubt that this provision in the written contract claimed to be breached was a dependent covenant, but even if there were any doubt, the courts strongly favor, as obviously just, that construction of contracts which makes the covenants or promises of the parties dependent, rather than independent: *Bank of Columbia v. Hagner*, 1 Pet. 455, 465, cited with approval in *Pollak v. Brush Electric Assn.*, supra; and that agreements should be construed as dependent whenever possible: *King Phillip Mills v. Slater*, 12

R. I. 82, 34 Am. Rep. 603, cited in note to *Huyett & Smith v. Chicago Edison Co.*, supra.

The court below in its memorandum opinion placed particular stress on the cases dealing with the equitable right of rescission (rec. page 15), but these cases have no application.

The Supreme Court in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. Ed. 814, held:

“Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. *Such an abandonment is not technically a rescission* of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance.” (Italics ours.)

2. PLAINTIFF'S RECOVERY IS NOT LIMITED TO THE CONTRACT PRICE.

It was strenuously contended by counsel for defendants in argument in the lower court, and the point will probably be made in this Court, in view of the inclusion in the record of the Plea Puis Darrein Continuance (rec. page 12) and the withdrawal of the funds from the registry (rec. page 17), that the plaintiff's recovery was limited to the amount set out in the writ-

ten contract. However, the right to recover reasonable compensation where the amount would exceed the contract rate depends on which party committed the breach that discharged the contract. In this case, the defendant committed the breach which discharged the contract, and the plaintiff may elect between the recovery of damages for such breach, and the recovery of reasonable compensation without regard to the rate of compensation fixed by the contract. See Page on Contracts, sec. 3271, page 5764.

The same author in sec. 3272, page 5766, stated:

“If the plaintiff has performed in part by furnishing something in value other than money, and the contract is discharged by the breach of the defendant, it is held in a number of jurisdictions that the plaintiff may recover the reasonable value of his performance *without regard to the contract rate*, if he wishes to base his recovery upon such theory. This is in accordance with the general theory of quasi-contract; and it is difficult to see why a defendant who has discharged the contract by his own default should be permitted to invoke its protection for the purpose of limiting the amount of plaintiff's recovery, unless the courts are ready to deny the right of recovery on the theory of quasi-contract, even where the defendant is in default, and unless they are ready to restrict the plaintiff to a right of action on the contract for damages.” (Italic ours.)

This doctrine has been recognized by the Supreme Court in *Thomas v. Brownsville, etc. Co.* 109 U. S. 522, 27 L. Ed. 1018, and by this Court in *Riefkin v. E. I. Dupont, etc. Co.*, supra.

In *Shaffner v. Killian*, 7 Ill. App. 620, an attorney was employed on a commission basis, and before the

completion of his employment he was discharged without any just cause. The court, after laying down the rule that upon refusal of defendant to perform his part of the contract, the other party may treat it as rescinded and sue on a quantum meruit, said:

“That is precisely what Shaffner was authorized to do, and what he virtually did. He proved up his compensation on a quantum meruit, and it amounted to as much at least as the sum he had in his hands. That evidence was uncontradicted. But the court confined him to commissions at the rate above specified, so far as he had gone under said employment, wholly disregarding the wrongful discharge by Killian. This was error, for which the decretal order appealed from must be reversed.”

To the same effect is *Davidson v. Laughlin*, supra; *Blair Engineering Co. v. Page Steel & Wire Co.*, supra; *Dalton v. American Ammonia Co.*, 127 N. E. 504.

3. IT IS NOT NECESSARY TO TENDER BACK PAYMENTS RECEIVED UNDER THE EXPRESS CONTRACT.

Another contention advanced by counsel for the defendants in the Court below was that the plaintiff could not treat the contract as discharged and sue in quantum meruit unless he had first tendered back the consideration already received under the express contract. That question has, however, been settled by this court in *Riefkin v. E. I. Dupont, etc. Co.*, supra, when it said:

“In any view, therefore, plaintiff was at least entitled to the amount already received, and the tender of that amount would have been an idle ceremony. The basis of a tender back is a dispute as to the ownership of the amount tendered, but here there was no such dispute, and hence no occasion or necessity for a tender.”

In the instant case, the plaintiff has received \$5,000.00, and the defendants do not dispute his right to at least that much. As a matter of fact, the balance of \$2,000.00 admittedly due under the contract was paid into the registry of the court by the defendants. In such circumstances, the tender back of the amount received would certainly be an “idle ceremony.”

4. THE QUESTION OF A BREACH AND ITS MATERIALITY IS FOR THE JURY.

The plaintiff contended in the court below, as shown in the lower court's memorandum opinion (rec. page 15) that whether the breach is material or essential is a question of fact for the jury.

This court in *Adams v. The Washington and Georgetown R. Co.*, 9 App. D. C. 26, 30, set out the province of the court and the jury in this language:

“The provinces of the court and jury in the Federal judiciary system are separate and distinct, and the line of division between them must be carefully observed. The ascertainment of the boundary is often a matter of difficulty in a particular case, and when the difficulty arises doubts should be resolved in favor of trial by jury, which is the constitutional right of every suitor in the court of common law.”

It may be stated as a general rule that whether a breach is material, except in very clear cases, is a question for the jury. *Pressey v. McCornack*, 84 Atl. 427, 235 Pa. 443; *Snedaker v. Torpey*, 41 Pa. Sup. Ct. 312; *Myrold v. Northern Wisconsin Co-op. Tobacco Pool*, 239 N. W. (Wis.) 422; *F. A. D. Andrea, Inc. v. Dodge*, 15 F. (2) (C.C.A.) 1003, 1005; *Denahan & Co. v. Granite Co.*, 45 Pa. Sup. Ct. 399.

The lower court takes the position that it is clear that the breach is not material. Conversely stated, the court held as a matter of law that the defendants had substantially performed this contract. This was not a matter of law for the court to decide, as substantial performance is always a question of fact for the jury to decide. *Denahan & Co. v. Granite Co.*, supra; *Morehouse v. Bradley, et al.*, 69 Atl. 937, 80 Conn. 611; *M. J. Daly & Sons v. New Haven Hotel Co.*, 99 Atl. 853, 91 Conn. 280, 281; *Chinigo, et al v. Ehrenberg*, 152 Atl. 305, 112 Conn. 381; *Bracco v. Tighe*, 75 Hun. 140, 27 N. Y. S. 34; *Murphy v. Stickley Simonds Co.*, 82 Hun. 158, 31 N. Y. S. 295; *Gibbons et al. v. Russell*, 13 N. Y. S. 879; *Strack v. Hurd*, 62 Hun. 618, 16 N. Y. S. 566; *Smith v. Town of Mary, Norman County*, 154 N. W. 993, 131 Minn. 105; *Waite v. C. E. Shoemaker & Co.*, 146 P. 736; 50 Mont. 264.

In *Nelson et al. v. Ohio Cultivator Co.*, 188 Fed. 620, it was held that whether defendant was justified in rescinding the contract was a question for the jury, and the direction of a verdict was error.

In *Pacific Export Lumber Co. v. North Pacific Lumber Co.*, 80 Pac. 105, 46 Ore. 194, there was an action to recover money paid under a contract alleged to have

been breached by the defendant and rescinded by plaintiff in consequence, evidence examined, and whether it was sufficient to establish the material phases of plaintiff's theory of the case, was held a question for the jury.

It has also been held in numerous cases to be important in determining whether a breach of a contract is material or not to determine if the guilty party acted in good faith: *Snedaker v. Torpey*, supra; *Pressey v. McCornack*, supra; or broke the contract without just cause: *Smith, et al. v. Stafford*, 14 Ill. App. 313; *Dennis v. Crooks*, 23 Mo. App. 532.

At no time have the defendants offered any justification for this breach of the contract, and, as a matter of fact, it must be presumed that it was breached without just cause, and not in good faith, by the opening statement containing the averment that the defendant Hitt, deliberately broke the contract. In the case of *Denahan & Co. v. Granite Co.*, supra, it was claimed that the breach was deliberate and intentional; that it was a substantial omission; and that the contract would not have been entered into if it had been known that the work would not be completed, and there the court said:

“Their agreement is the law by which they are controlled, and there could be no right of recovery on an express contract for the completion of a particular work until the plaintiff was prepared to show that the work was completed according to the contract, or that there was such substantial performance as equitably entitled the plaintiff to recover for what was actually done. But the doctrine of *substantial performance* is in relief of the party applying it, and must be shown to be applicable under the facts. *It is a principle in-*

tended for the protection and relief of persons who honestly and in good faith endeavor to perform their contracts in all material and substantial particulars so that their right to be paid may not be forfeited where omissions or defects are unimportant or technical. It is incumbent on one who proposes to claim its protection to show that there was no substantial or wilfull departure from the agreement. Until this is done, the question of substantial performance does not arise and the failure to perform the entire contract defeats the action. Where there has been an honest and substantial attempt to complete the contract, a departure therefrom in unimportant matters will not preclude a recovery and the party will be allowed the amounts of the contract, deducting therefrom a sufficient sum to fully compensate the defendant for the loss he sustains in the failure of the plaintiff to give strict performance: Pepper v. Philadelphia, 114 Pa. 96; Gallagher v. Sharpless, 134 Pa. 134, Holmes v. Oil Co., 138 Pa. 546; Filbert v. Philadelphia, 181 Pa. 530. This right does not exist, however, in favor of a contractor who is guilty of fraud or gross negligence or who unjustifiably abandons the work before its completion and the question of the good faith of the contractor, and whether there was a material and substantial departure from the contract are questions for the jury: Holmes v. Oil Co., 138 Pa. 546; Gallagher v. Sharpless, 134 Pa. 134; Snedaker v. Torpey, 41 Pa. Superior Ct. 312.” (Italics ours.)

In *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33, it was claimed that there was only a partial breach arising out of the construction of the contract, and the court said, page 55:

“In *Mersey Steel & Iron Co. v. Naylor*, L. R. 9 Q. B. Div. 648, Jessel, M. R., reaffirms and approves the doctrine of *Freeth v. Burr*, and holds

that the question of whether there has been a renunciation of the contract by the defendant *is a question of fact*, to be determined by the consideration of the nature of the breach, and the circumstances under which it occurred. The case, however, went off upon the holding that the circumstances were not sufficient to evince a determination on the part of the defendant to put an end to the contract, and to be no longer bound by it. The decision was affirmed by the House of Lords on appeal, Lord Selbourne there saying: 'You must look at the actual circumstances of the case, in order to see whether one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation,—to an absolute refusal to perform the contract,—such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; *and I think nothing more is necessary, in the present case, than to look at the conduct of the parties, and see whether anything of that kind has taken place here.*' *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 438. See also *Roper v. Johnson*, L. R. 8 C. P. 167; *Ex parte Stapleton*, L. R. 10 Ch. Div. 586; *Planche v. Colburn*, 8 Bing. 14; *Danube & B. S. Railway & Kusterje Harbour Co. v. Xenos*, 13 C. B. N. S. 825." (Italics ours.)

And again at page 59:

"It is urged, however, that there was here only a *partial breach*, arising from a difference in the the construction of the contract, and that there was at no time a repudiation or renunciation of the contract by appellant,—that it was at all times desirous of keeping it in force, and performing it. *These are, as a matter of course, questions of fact.*" (Italics ours.)

In *Harris v. Sharples*, 202 Pa. 243, 58 L. R. A. 214, the plaintiff brought suit to recover the contract price for lithographing and printing catalogue covers. The contract provided that the covers would be in accordance with the sample submitted. They were in accordance with the sample when printed and delivered, except that the plaintiff had inserted in very small type on the rear of the cover the name of its firm, claiming that it was the custom to do so. The plaintiff claimed that it had substantially performed the contract, but the court held, page 216, that the lower court was not called upon to apply the doctrine of substantial compliance with the contract; that the plaintiffs could not invoke it as the departure from the proof was *wilful and intentional*.

A somewhat analogous case to the one here in question is that of *Campbell v. Houser Lumber Co.*, 265 Pac. 147 Wash. 140. This was a contract for logging certain sections described in the contracts. The plaintiff had cut the logs on two parcels, and was proceeding with the third when the defendant prevented him from cutting the logs on that third parcel, known as Section 23. The court discussed very fully this phase of the case, in the following language:

“The appellant does not contend that the evidence was not sufficient to sustain a finding that it actually stopped the work of logging Section 23, but contends that this was such a minor and inconsequential part of the entire contract that its breach in that respect did not justify the respondent in his refusal to perform the remainder of the work, and that, in consequence, the breach was on his part.

“It is the rule, no doubt, that in contracts of this character, inconsequential or trivial breach of

it on the part of one of the parties thereto will not justify the other in declaring the contract at an end, even though the contract be an entirety as distinguished from one that is severable. The law looks to the substance of things rather than to its inconsequentialities, and it is only breaches of a contract which go to its substance that will justify the other party in refusing to further perform. But while the rule is well established, it is not always easy of application. The instances are not many where the court may declare as a matter of law that the breach is not of the substance of the contract. Usually the question is of mixed law and fact, and one for the determination of the trier of the fact under instructions as to the applicable principles of law.** We are clear that if the amount of the timber was as the respondent contends, and that, in addition to his loss of profits on that part of the work, he did incur additional losses on the other parts of the work, we are not so justified. The trial court left it to the jury to say whether under all the circumstances the breach of the contract on the part of the appellant was substantial, and we cannot conclude that it erred in so doing.

“The appellant further contends that, if it be conceded that the breach committed by the appellant was of a substantial part of the contract, the breach did not justify an entire abandonment of the contract on the part of the respondent. The argument is that the breach must be of a vital term of the contract, rendering the performance of the remainder impossible, or at least impractical, before the party against whom the breach is committed is justified in abandoning performance in its entirety. But we do not understand that the rule goes to this extent. The authorities generally hold, and it is the just rule, we think, that if the breach be of a substantial part of an entire contract, as distinguished from a part that is immaterial or inconsequential, although the

breach may not render a performance of the remainder impossible or impractical, an abandonment of the whole is justified. Doubtless, in such a case, the party against whom the breach is committed may perform that part of the contract he is permitted to perform, and resort to an action in damages for the breach. But he has a choice of remedies, and as the choice is with him, the other party may not lawfully complain of his choice. Where a different rule has been applied, it has generally been in instances where the contract consists of several and distinct covenants, so far separable and independent that interference of one will not materially affect the performance of the other. But this principle is without application in this instance. Here, the contract was an entirety. The timber was in one body; the notation of the land on which it was situated by governmental sections being only a convenient means of description. It could be logged as one body, and the cost of the preparatory work, and much of the cost sometime denominated as 'overhead' was the same whether much or little of it was logged. The quantity was material to the respondent. It could mean the difference between a profit and a loss.

* * * *

"The trial court gave to the jury, among others, the following instructions:

" 'You will see, that the first question you will be called upon to answer is whether the defendant's direction to the plaintiff to do no work on the southeast quarter of Section 23 justified plaintiff in his abandonment of the further performance of the contract. The burden is upon the plaintiff to show by the greater weight of the evidence in this case that he was so justified. Whether he would be justified or not depends upon the char-

acter of that part of the contract as related to the remainder of the contract. If that part of the contract which refers to the southeast quarter of section 23 was a substantial part of the contract; if plaintiff would have been less willing to enter into the contract if that part were not included; and if the profits which the plaintiffs would otherwise have made from the full performance of the contract would have been substantially decreased and the performance of the contract rendered substantially less profitable by not being permitted to log that quarter—then he was justified in his refusal to do any further work thereunder * *. *Unquestionably, we think, whether the respondent would have been less willing to enter into the contract with the work to be performed on section 23 eliminated therefrom, and whether he regarded that part of the work as a substantial part of the contract, were circumstances which the jury were entitled to consider in determining whether there had been a substantial breach of the contract, and this being true, it was not, of course, error for the court to so state.*" (Italics ours.)

The lower court in the concluding paragraph of its opinion in the case at bar is very clear that the breach is not material, yet in the first paragraph, the court thinks it is very doubtful whether the contract required defendants to put the plaintiff's name on any brief. This certainly indicates that that particular provision of the contract, which was breached, was ambiguous, and as such, it was for the jury to determine from the evidence, what the parties meant and understood by the terms used in the contract. *Pacific Export Lumber Co. v. North Pacific Lumber Co.*, supra; *Dunaway v. Roden*, 71 So. 70, 14 Ala. A. 501; *Taxi Service Co. v. Gulf Refining Co.*, 147 N. E. 863, 252 Mass. 314.

breach may not render a performance of the remainder impossible or impractical, an abandonment of the whole is justified. Doubtless, in such a case, the party against whom the breach is committed may perform that part of the contract he is permitted to perform, and resort to an action in damages for the breach. But he has a choice of remedies, and as the choice is with him, the other party may not lawfully complain of his choice. Where a different rule has been applied, it has generally been in instances where the contract consists of several and distinct covenants, so far separable and independent that interference of one will not materially affect the performance of the other. But this principle is without application in this instance. Here, the contract was an entirety. The timber was in one body; the notation of the land on which it was situated by governmental sections being only a convenient means of description. It could be logged as one body, and the cost of the preparatory work, and much of the cost sometime denominated as 'overhead' was the same whether much or little of it was logged. The quantity was material to the respondent. It could mean the difference between a profit and a loss.

* * * *

"The trial court gave to the jury, among others, the following instructions:

" 'You will see, that the first question you will be called upon to answer is whether the defendant's direction to the plaintiff to do no work on the southeast quarter of Section 23 justified plaintiff in his abandonment of the further performance of the contract. The burden is upon the plaintiff to show by the greater weight of the evidence in this case that he was so justified. Whether he would be justified or not depends upon the char-

acter of that part of the contract as related to the remainder of the contract. If that part of the contract which refers to the southeast quarter of section 23 was a substantial part of the contract; if plaintiff would have been less willing to enter into the contract if that part were not included; and if the profits which the plaintiffs would otherwise have made from the full performance of the contract would have been substantially decreased and the performance of the contract rendered substantially less profitable by not being permitted to log that quarter—then he was justified in his refusal to do any further work thereunder * *. *Unquestionably, we think, whether the respondent would have been less willing to enter into the contract with the work to be performed on section 23 eliminated therefrom, and whether he regarded that part of the work as a substantial part of the contract, were circumstances which the jury were entitled to consider in determining whether there had been a substantial breach of the contract, and this being true, it was not, of course, error for the court to so state.*" (Italics ours.)

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It should have been submitted to the jury to determine the construction the parties to the contract placed upon it, because "the parties having placed on their contract a practical construction which harmonized with their understanding, at the time of its execution, that construction became a part of the contract itself, and the court will therefore adopt it. *Insurance Co. v. Dutches*, 95 U. S. 269, 24 L. Ed. 410; *Garrell v. Home Life Ins. Co.*, 63 Fed. 371, 378, 11 C. C. A. 240; *Seymour v. Warren*, 179 N. Y. 1, 6, 71 N. E. 260." *Nelson et al. v. Ohio Cultivator Co.*, supra.

This court recognizes the right to introduce evidence to show the construction parties thereto placed upon a contract. In *J. E. Hanger, Inc. v. Fitzsimmons*, 50 App. D. C. 384, 386, Mr. Justice Robb said:

"While, of course, preliminary negotiations are merged in the contract itself, they may, as in this case, tend to enlighten the court as to the sense in which the parties understand the terms employed in the contract. The letter preceding that instrument, wherein the corporation delayed the interview at which the contract was made 'until the party who would be expected to make the trip to Russia' as the representative of the corporation could be present, does not contradict or vary the terms of the contract but tends to elucidate its provisions. The correspondence subsequent to the contract, similarly, is in entire harmony with its provisions, and furnishes the best evidence as to the meaning placed upon it by the parties themselves while their relations were harmonious. This contemporary construction placed upon the contract by both parties, therefore, was properly received in evidence."

The plaintiff in his opening statement said that he would prove that the provision of the contract in ques-

tion was a most important one; that it was the primary inducement for him to enter into the contract, and by inference at least, and his opening statement is entitled to every reasonable inference, that he would not have entered into the contract without it. He further stated that he expected to prove that the breach was deliberate, and this certainly warrants the inference that it was wilful and intentional, and as the opening statement indicated that it would be proven from the negotiations and conduct of the parties what was intended by that provision in the contract, it being admittedly ambiguous, this case under the above authorities should unquestionably have been submitted to the jury to determine whether the breach was material, and whether from all the facts and circumstances the plaintiff was authorized to treat the contract as discharged.

The lower court cites *Speed v. Bailey*, 153 Md. at 661, as authority for its conclusion that the breach is so slight that the court could pass on it as a matter of law. That case, however, is not in point. There, the plaintiff contracted with the defendant to build a house. Under that contract, he was to pay the defendant certain stated sums during the progress of the work. In the plaintiff's declaration and bill of particulars made a part thereof, it was set out that the plaintiff had paid the defendant \$2,000.00; that the plaintiff was then in default in his payments to the defendant in the amount of \$8,000.00. The only breach complained of was set out in the declaration as a failure of the defendant to complete certain minor modifications of the written contract which the defendant had agreed to complete as soon as the weather opened up, and no time for performance of these items was

claimed; in fact, it was indicated in the pleadings that the plaintiff had agreed that these items could be completed when the weather permitted. The plaintiff sought to rescind the contract because of defendant's alleged failure to complete these items, and to recover back the \$2,000.00 he had paid the defendant. Obviously the plaintiff should not be permitted to rescind the contract because, under the pleadings, there was admittedly no breach at all. The court in its conclusion stated:

“It appearing from the declaration that the contract was substantially performed; and that at the time the appellee attempted to rescind he was in default, it follows that the appellee was not entitled to maintain an action upon the declaration herein filed, and the demurrer to the same should have been sustained.”

In that case, the plaintiff's declaration clearly showed that there was no real breach at all.

In this case, the pleadings as to the defendants Cain and Robinson present an issue squarely for the jury as to whether or not the services rendered by the plaintiff were rendered at the instance and request of these two defendants. As to the defendant Hitt, the issue made by the pleadings and properly for the jury was whether or not the defendant Hitt had wilfully and arbitrarily breached one of the material provisions of the contract.

5. THE PLAINTIFF DID NOT NEED TO ALLEGE OR PROVE SPECIAL DAMAGE.

The lower court in its opinion (rec. page 15) states that it is unable to see that any actual damage was

suffered by the plaintiff, and that counsel in the opening statement carefully refrained from stating that any damage was suffered. It is difficult to conceive upon what theory the lower court presumes that it is necessary in a suit on a quantum meruit to either allege or prove special damages. The declaration sets out a good cause of action on a quantum meruit, and it did not allege, nor was it necessary to do so, any actual or special damages. It is only necessary to allege and prove actual damages upon the breach of a contract when the plaintiff elects to sue in damages for such breach. The plaintiff in this case having elected to sue on a quantum meruit, he could not afterwards maintain an action for damages because the latter is based on the assumption of the continuance of the contract, while the former treats the contract as rescinded. In pursuing one of these two remedies, the plaintiff naturally abandons the other. See *Keedy v. Long*, supra.

In suing on a quantum meruit, the plaintiff generally relies on the common counts, and it is inconceivable that any court would hold that it was necessary to prove actual damages in suing on the common counts.

That the plaintiff in this case set out a good cause of action in his declaration is clearly shown in the case of *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695, 699, where the court said:

“The first question is whether this action is quantum meruit for services rendered and reasonable expenses incurred, as claimed by the plaintiff; or whether it is an action for damages for breach of contract. That the petition declares upon quantum meruit we think there can be no

doubt. It is true the petition sets out the contract of employment, and shows that services were rendered and moneys expended in the execution of it; but it proceeds to aver that defendant wrongfully discharged the plaintiff, and then states the value of the services rendered and moneys expended, and prays judgment therefor, less the amount received. Had the plaintiff declared for the value of his services, saying nothing about the contract, and to this the defendant had answered by setting up the special contract according to his version of it, and the plaintiff had replied by setting out the contract according to his theory of it, and alleged that the defendant wrongfully revoked the agency, because of which he demanded the value of his services up to the date of his discharge, the issues would have been in substance the same that they are under the present pleadings. It is the theory of our code that the plaintiff must state the facts constituting his cause of action. If he proposes to treat the contract as rescinded, and recover for the value of services rendered, as he may do under certain circumstances, there is no reason why he may not set out the contract, the rendition of services thereunder, the wrongful termination of the contract by the defendant, and then declare for the value of the services rendered. Such is the plaintiff's petition in this case, and it is clearly a declaration upon quantum meruit: *Ehrlich v. AEtina Life Ins. Co.*, 88 Mo. 249."

If it were not necessary to allege actual damages in the declaration, the opening statement, which set out all the material averments of the pleadings, but in greater detail, should not be required to allege any fact which is not material to the issue as presented by the pleadings. As a matter of fact, if the case had gone to the jury, the plaintiff would only have been permitted to introduce evidence as to the reasonable value of his services and expenses, and it would be

error to allow evidence to be introduced as to loss of profits or other elements of damage which he could have shown if he had sued in damages for the breach of the contract. *Davis v. Tubbs*, 7 S. D. 488, 64 N. W. 534.

6. A DIRECTED VERDICT ON THE OPENING STATEMENT FOR ALL THE DEFENDANTS SHOULD NOT HAVE BEEN GRANTED.

Upon a demurrer to the opening statement the facts stated therein must be taken as true: *Dalury v. Rezin*, 170 N. Y. S. 1045, 183 App. Div. 456; *Chysky v. Drake Bros. Co.*, 182 N. Y. S. 459, 192 App. Div. 186; *Roberts v. Colorado Spgs. & I. Ry. Co.*, 101 P. 59, 45 Colo. 188; *Gray v. City of Boston*, 178 N. E. (Mass.) 286; and all the material facts stated in the declaration and by counsel in the opening statement, together with every reasonable inference therefrom, must be resolved in the plaintiff's favor: *Brush v. Lindsay*, 206 N. Y. S. 304, 210 App. Div. 361; *Kelly v. Bergen County Gas Co.*, 67 A. 21, 74 N. J. Law 604; *Locker v. American Tobacco Co.*, 106 N. Y. S. 115, 121 App. Div. 443, aff. 88 N. E. 289, 195 N. Y. 565; *Moffet v. Ford Motor Co.*, 3 Pac. (2d) 405; *Carr v. Delaware, L. & W. R. Co.* (N. J.) 75 Atl. 928; *Hannigan v. Smith*, 28 App. Div. 176, 50 N. Y. S. 845; *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. S. 473; *Roberts v. Colorado Springs & I. R. Co.*, supra.

As was stated in *Nelson, et al. v. Ohio Cultivator Co.* supra, at page 629, 630:

“* * * It is the duty of a court, when a motion is made to direct a verdict, to take that

view of the evidence most favorable to the party against whom it is desired that the verdict should be directed, and from the evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for that party.” (Citing cases).

In *Graybill v. Smadbeck*, 178 N. Y. S. 413, the court said:

“In *Hoffman House v. Foote*, 172 N. Y. 348, 350, 65 N. E. 169, the Court said: ‘The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies, where there is or ever was anything to decide. It cannot be resorted to in many cases with justice to the parties, unless the counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in view of the case, is fatal to the action.’ We think, upon the papers presented, that the court exceeded its authority in nonsuiting the plaintiff without further investigation of the facts presented. Upon the face of the pleadings the plaintiff had some cause of action, and she is certainly entitled to her day in court thereon.”

In *Horne v. Diamond*, 163 N. Y. S. 865, the Court stated:

“As, therefore, there was nothing in the opening of counsel, coupled with the explanation subsequently made by him to the court, to justify the inference that he rested his case upon a state of facts which either could not be completely proved, or which did not constitute a *good cause of action*, the judgment must be reversed, and a new trial granted.” (Italics ours.)

A very clear exposition of the law governing the authority of the courts both in this country and in England in directing verdicts on the opening statements of counsel is contained in the case of *Emerich Co. v. Siegel, Cooper & Co.*, 108 Ill. App. 364, where the court stated:

“That counsel for appellee considered the declaration stated a cause of action is evidenced by the fact that they did not demur thereto, but pleaded to it. It follows that if the judgment of the Circuit Court is sustained, it must be sustained upon the sole ground that the facts stated by counsel for appellant in his opening address to the jury showed that appellant was not entitled to recover in this action. *Haley v. The Western Transit Co.*, 76 Wis. 355.

“ ‘If the declaration is defective the point may be raised by demurrer, or if the defect is one which is not cured by verdict, it may be raised on motion in arrest of judgment or on error, but such defect cannot be reached by demurrer to the evidence.’ *Gerke v. Fancher*, 158 Ill. 375, 382.

“It would often save the expense and labor of a long trial if counsel were to state in their opening, the case precisely as it could be established by competent evidence, and then take the opinion of the court as to whether or not the action would lie. In such instances, the power of the court to pass upon the question is undoubted. But such is not this case. Here the appellant objected to such action upon the part of the court, and denied that the court had the power to thus peremptorily direct the jury to find for appellee.

“We have not considered it necessary to set out the opening statement of counsel for appellant, for we think that this case must be decided

upon the power or the lack of power in the trial judge, after issue joined, to direct a verdict in a case not founded upon a corrupt cause of action, solely upon the insufficiency of the opening statement of the attorney for the plaintiff. * * *

“In the courts of the United States the settled rule is, where it is shown by the opening statement of counsel for the plaintiff that the contract on which the suit is brought is void as being either in violation of law or against public policy, the court may and should direct the jury to find a verdict for the defendant. * * *

“In England the law in this regard was stated in 1891 by the court of appeals in *Fletcher v. London & N. W. Ry. Co.*, 65 Law Times Reporter 605. After plaintiff's counsel had opened his case to the jury the trial judge, without the consent of such counsel, took the case from the jury. Upon appeal Lord Esher said:

“ ‘I am of the opinion that the judge at the trial struck too soon, even if he was entitled to strike at all. Further than that, I am of opinion that a judge at the trial has no right to nonsuit a plaintiff upon his counsel's opening statement without the consent of his counsel. The opening statement of counsel may be wrong as to some facts upon the instructions contained in his brief, or by accident; in spite of the greatest care the evidence given may differ from the facts stated in the opening statement. * * I therefore lay down this proposition to the full extent, that a judge at the trial has no right to nonsuit the plaintiff upon the opening of his counsel, unless counsel consents. In this case Mr. Kennedy insisted upon his right to call evidence, but the judge said he would act notwithstanding, and insisted upon nonsuiting the plaintiff. In so doing, he was wrong, and this case must be tried.’

“Lopes, L. J., said: ‘In my opinion no judge has power to nonsuit a plaintiff upon his counsel’s opening without counsel’s consent.’

“Kay, L. J., said: ‘I was startled by the supposition that a suitor might lose his case because his counsel has omitted or misstated something in his opening which would induce a jury to find for the plaintiff. That would be a startling result in an English court of justice.’

“The general rule in the state courts seems to be, where issue has been joined, that it is error for the trial judge to direct a verdict for the defendant upon the opening statement of plaintiff’s counsel.”

In *Pietsch v. Pietsch*, 245 Ill. 254, 92 N. E. 325, 29 L. R. A. (NS) 218, the court succinctly stated the law to be, page 223, 224:

“When the jury had been sworn to try the issues and render a verdict according to the evidence, it was the privilege of the attorney for each party, if he saw fit to do so, to make an opening statement of what he expected to prove. Such a statement is not intended to take the place of a declaration, complaint, or other pleading, either as a statement of a legal cause of action or a legal defense, but is intended to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard. How full it shall be made, within reasonable limits, is left to the discretion of the attorney; but the only purpose is to give the jury an idea of the nature of the action and defense. To relate the testimony at length will not be tolerated. I Thomp. Trials, 267. A party is entitled to introduce evidence and prove a cause of action, or to defend against evidence tending to sustain a cause

of action, if no statement at all is made, and is not confined in the introduction of evidence to the statement made in the opening, if one is made. The opening statement may be wrong as to some facts, and there is no requirement that it shall give all the facts of the case, which may turn out to be different from the statement. * * * But if parties have a right to a trial by jury of the issues made by the pleadings, the verdict must rest upon evidence or want of evidence, and not upon opening statements.

“The decision chiefly relied upon in support of the ruling of the court was made in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. ed. 539; but that was a case where the *statement disclosed a contract that was void, as being corrupt in itself and prohibited by morality and public policy.*” (Italics ours.)

It has even been held where the plaintiff in his opening statement showed that he would rely on an express contract, it did not preclude him from recovering on an implied contract. *Marcy v. Shelburne Falls & C. St. Ry. Co.*, 210 Mass. 197, 96 N. E. 130.

In this jurisdiction on motions to direct a verdict even if all the evidence is in for the plaintiff this court holds that a motion to direct a verdict against plaintiff admits every fact in evidence tending to sustain his case, and every reasonable inference deducible, and that the motion can be granted only when but one reasonable view can be taken from the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover. *Faucett v. Bergmann, et al.*, 57 App. D. C. 290.

In *Catholic University v. Waggaman*, 32 App. D. C. 307, 321, this court, after setting out the principle above stated, said:

“These narrow restrictions apply where the court has before it the whole case. Even less latitude is allowed where the jury are peremptorily instructed at the conclusion of the plaintiff’s affirmative case than where such an instruction is given when all the evidence of the parties is before the court.” (Italics ours.)

In *King v. Lane* (Okla.) 169 Pac. 901, L. R. A. 1918-C, 351, 352, the court held that as long as the petition set out a cause of action, it was error for the court to direct a verdict on the opening of counsel.

To the same effect is *Brashear v. Rabenstein*, 71 Kan. 455, 80 Pac. 950, where the court held that it was not even necessary for a plaintiff’s opening statement to set out a cause of action.

During the course of the argument in the court below, the court said (rec. page 29) that it assumed that it was justified in assuming that no actual damage was suffered because there was no statement to that effect in the opening statement, and the court construed that as an admission that there was no damage or no damage that could be proved, and because the court assumed that there was no actual damage, it decided that it was justified in treating the breach as so slight that it could direct a verdict for the defendants. The pleadings, as has been heretofore set out, stated a good cause of action, and presented issues that were squarely for the jury to determine. The opening statement recited all the facts and a great deal more than were set out in the pleadings. All these facts must be taken as true, together with every reasonable inference that could be drawn therefrom.

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It was a fact that the clause in the written contract breached by the defendant Hitt was the primary inducement which prompted plaintiff to enter into the contract; and it was a reasonable inference that without such a clause therein, the plaintiff would never have entered into such a contract, and it is a fact the defendant Hitt deliberately, intentionally and wilfully broke the contract.

With the facts as set out in the opening statement and the pleadings, the lower court was not justified in presuming that the breach was so slight that the court could decide it as a matter of law.

The leading case on the subject of directed verdict upon an opening statement is *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. There a verdict was directed on the opening statement because it disclosed that the contract was void as being corrupt in itself and prohibited by morality and public policy.

In this jurisdiction there have been to our knowledge only two cases where a verdict was directed on the opening of counsel.

In *Brown v. District of Columbia*, 29 App. D. C. 273, the opening statement showed that the District of Columbia was being sued for failure to perform a general governmental duty, for which obviously the District of Columbia was not liable.

And in *Hornblower v. George Washington University*, 31 App. D. C. 64, the opening statement of counsel showed conclusively that his cause of action was

barred by the statute of limitations, which statute, of course, the defendant had pleaded.

In no case of which we have any knowledge has a court ever been upheld that directed a verdict on the opening statement of counsel, unless the pleading and the opening statement showed that the cause of action ~~was corrupt~~, void, against public policy, or under no view of the case, could the jury, if it were submitted, possibly return a verdict for the plaintiff.

7. CONCLUSION.

In conclusion it is respectfully submitted that the Court erred in directing a verdict against the plaintiff for the defendant Hitt, defendant Cain, and defendant Robinson, on the opening statement of plaintiff's counsel.

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Attorneys for the Appellant.

FOR MR. JUSTICE GRONER

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JUN 1 3 1932

Henry M. Hodges

CLERK

IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1932.

—
No. 5621.
—

HALSEY MCGOVERN, *Appellant*,

vs.

MOULTRIE HITT, ET AL., *Appellees*.

—
BRIEF ON BEHALF OF APPELLEES.
—

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J. WILMER LATIMER,
Attorney for Appellee Robinson.

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IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1932.

No. 5621.

HALSEY MCGOVERN, *Appellant*,

vs.

MOULTRIE HITT, ET AL., *Appellees*.

BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This case is before this court upon an assigned error to the effect that the court below improperly directed a verdict for the defendants on the plaintiff's opening statement. It is, therefore, necessary that this court be fully advised as to what statements were made by plaintiff's counsel in his recital to the jury of what he expected to prove. Because of the omission of several important facts in the "statement of the case" contained in appellant's brief it becomes essential to a

proper understanding of the case to have placed before the court what actually occurred. When the court definitely understands what transpired quite a different picture will be presented from that portrayed in appellant's brief, and will make it unnecessary to specifically reply to much of what is contained therein.

No good purpose will be subserved by dwelling upon the immaterial transactions and negotiations so elaborately outlined by appellant (R. 22-24) leading up to the written contract of April 25, 1927, around which the whole case hinges; nor is it necessary to refer to the statement of plaintiff's counsel in his opening remarks to the jury (R. 23) to the effect that the work for which compensation is claimed was not covered by the verbal arrangement between the parties prior to the execution of said written contract dated April 25, 1927 (R. 8-10). This is unnecessary for the following reasons: (a) the execution and delivery of the written contract was admitted (R. 25, 29, 11); (b) no question has been raised with regard to compensation under the oral contract mentioned in the early part of plaintiff's opening statement to the jury (R. 29); (c) the written contract by its express terms supercedes all prior understandings between the parties (R. 10); and (d) the only basis claimed for this suit is an alleged default committed by appellee Hitt consisting in his supposed failure to comply with an alleged material provision of that written contract (R. 29, 26) to the effect that appellant's name should appear upon what is called by appellant "the second brief" filed before the Interstate Commerce Commission in the case which was the subject-matter of that written contract.

It is also useless to discuss that portion of page 24

of appellant's brief which apparently takes the view that, assuming a verdict *in favor of* the appellee Hitt was properly directed, it could not properly have been directed in *favor of* his co-defendants Cain and Robinson. Appellant is estopped from making any such contention because during the course of the argument upon this motion for a directed verdict it was agreed by counsel for the purposes of this motion that "if the motion for a directed verdict should be granted as to the defendant Hitt, it should also be granted as to the other defendants, and if denied as to the defendant Hitt, it should also be denied as to the other defendants" (R. 28, 29).

The case then resolves itself into this: appellant entered into a written contract with appellee Hitt who acted entirely on his own behalf (R. 8, 10) (not "acting on behalf of himself and Cain and Robinson" as alleged on page 4 of appellant's brief) by virtue of which contract appellant undertook to do four things, to wit:

1. To prepare exhibits bearing upon the right of certain short line railroads to an increase in their pay for carrying the mail.

2. To present in person the necessary supporting testimony.

3. To prepare and write "the first draft of brief" for these lines on a hearing before the Interstate Commerce Commission, and to aid in its completion as far as might be desired.

4. **"To appear of record and on brief".**

On the other hand, appellee Hitt agreed:

1. To pay appellant \$3,000 in ten monthly installments.

proper understanding of the case to have placed before the court what actually occurred. When the court definitely understands what transpired quite a different picture will be presented from that portrayed in appellant's brief, and will make it unnecessary to specifically reply to much of what is contained therein.

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2. To present in person the necessary supporting testimony.
3. To prepare and write "the first draft of brief" for these lines on a hearing before the Interstate Commerce Commission, and to aid in its completion as far as might be desired.
4. **"To appear of record and on brief".**

On the other hand, appellee Hitt agreed:

1. To pay appellant \$3,000 in ten monthly installments.

2. To pay appellant \$2000 more in one sum contingent upon these mail pay cases resulting in an aggregate net return of \$100,000 or more to appellee Hitt and his associates.

3. To pay one Hunt a salary of \$150 per month for two months.

4. To assume the expenses of certain clerical assistance.

5. To assume all reasonable traveling expenses of appellant in attendance at a hearing outside of Washington.

It is admitted by all parties that appellant performed the first three covenants above mentioned on his part to be performed, also that his name appeared by record in the case and on the *first* brief (which was the main brief) filed before the Interstate Commerce Commission (R. 15, 25, 27, 28, and insert between Record pages 28 and 29). It is also admitted that appellee Hitt performed all of the five covenants on his part to be performed (R. 15, 26, 29). The \$2,000 to be paid under the second covenant had not been paid at the time suit was filed (R. 7) because the fees to appellees had not resulted up to that time in an aggregate net return of \$100,000. However, after the issue was joined in the case enough additional fees had been received to exceed the \$100,000 limit, and appellees then filed a plea puis darrein continuance in which that fact was set up. The plea also set forth the fact that the \$2,000 to be paid on the happening of that event had been tendered by Hitt to appellant and that he had refused to receive it, and that this amount with interest had been paid into the registry of the court (R. 12, 14). The record shows that after the verdict in this case appellant moved for leave to withdraw that sum, and that it was thereupon paid to him (R. 17, 18).

Absolutely the only claim made by appellant as to any default upon the part of any of these appellees consists in the allegation that the defendant Hitt "wilfully omitted and refused to put the plaintiff's name on the second and final brief" filed with the Interstate Commerce Commission (see amended replication, R. 11, and appellant's opening statement, R. 26, 27, 29). It is because of that alleged breach of contract on the part of appellee Hitt that appellant claims the right to treat the written contract of April 25, 1927, as rescinded and to sue upon a *quantum meruit* (R. 11). If he had no such right his action was misconceived and a verdict for the defendant was properly directed.

Argument.

The above recital of facts presents a clear-cut issue of law. There is no disputed fact in issue for the determination of a jury.

Power of court to direct verdict upon plaintiff's opening statement.

It is too late to urge in this court that under such conditions as exist in this case, a motion for a directed verdict could not properly be made. The appellant's opening statement indicates very clearly that if such a motion had not been granted a protracted and expensive trial must necessarily have ensued.

In the case of *Oscanyon vs. Winchester Repeating Arms Company*, 103 U. S. 261, 26 L. Ed. 539, the Supreme Court outlined the general principles applicable in this sort of case, not at all confining their application to a case where a contract "was void as being corrupt in itself, and prohibited by morality and public policy" as suggested on page 34 of appellant's brief. The court in that case said:

“Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove, that might be more properly urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, *as where the evidence is conflicting*,* and leave the matter to the determination of the jury.

“In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court’s procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case.”

* * * * *

“Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action.

*Italics supplied.

“Here there were no unguarded expressions used, nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client’s claim originated, and seldom was a case opened with greater fullness of detail. He dwelt upon and reiterated the statement of the fact which constituted the ground of the court’s action in directing a verdict for the defendant.”

In the case at bar the procedure complained of was not hastily adopted upon any inadvertent statements made by appellant’s counsel. On the other hand, it is evident that the statement had been carefully prepared and was presented with equal care, and that the court was meticulous in giving counsel every opportunity to present facts which had not at first been elaborated by him. These additional facts were treated as a part of his opening (R. 27, 28). Appellees’ counsel also gave appellant’s counsel a similar opportunity, of which the latter availed himself. So carefully was the proceeding conducted that during its course certain stipulations of fact were entered into (R. 28, 29). This brought the procedure directly within the ruling of the Supreme Court of the United States in the case of *Oscanyon vs. Winchester Repeating Arms Company, supra*.

The cases cited by appellant on the subject of involuntary non-suits have no application here. The Supreme Court in the case last cited pointed out the difference between an involuntary non-suit and a directed verdict in the following language:

“Had the case been pending in a court of some of the States, or in an English court, a non-suit would have been ordered, if the facts stated had

been deemed fatal to the action. Involuntary non-suits not being allowed in the Federal Courts, the course adopted was the proper proceeding. The difference in the two modes is rather a matter of form than of substance, except in the case of a non-suit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.

“The language of this court in numerous cases is in accordance with these views, though used with reference to directing a verdict after evidence is received. But, as already stated, it cannot make any difference as to the power of the court, whether the facts be developed by the evidence, or be admitted by counsel.”

This court has given its sanction to the direction of a verdict on the plaintiff's opening statement in two cases. *Brown vs. D. C.*, 29 App. D. C. 273. *Hornblower vs. G. W. U.*, 31 App. D. C. 64. In these cases this court restricted the application of the practice of directing verdicts within no such narrow confines as is contended for by appellant's counsel. In the case of *Hornblower vs. G. W. U.*, *supra*, this court at page 72 quoted with approval the language of the Supreme Court of the United States in the case of *Butler vs. National Home for Disabled Volunteer Soldiers*, 144 U. S. 72, 36 L. Ed. 351, in which the Court said:

“Of course, in all such proceedings nothing should be taken without full consideration, against the party making the statement or admission. He should be allowed to explain or qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action.”

Why, then, should appellant fill the brief with extracts from opinions of state courts where no such practice prevails and in some of which it would appear that under no circumstances is a directed verdict upon the plaintiff's opening statement proper!

Right of Rescission.

In order for appellant to rescind the written contract and sue upon a *quantum meruit* he must demonstrate that:

1. A covenant in the contract was breached;
2. It was a covenant that *Hitt* was bound to perform;
3. The mutual covenants were dependent and not independent;
4. The covenant was a material one.

It is respectfully submitted that appellant can show none of these things. And if he should be able to do so he must go further and show:

5. That he is not bound by the contractual compensation agreed upon.

I.

THERE WAS NO BREACH OF ANY COVENANT.

The breach alleged both in the replication (R. 11) and in plaintiff's opening statement (R. 27, 29) was the failure to put appellant's name on the *second* brief filed before the Interstate Commerce Commission. If this second brief was not within the contemplation of the parties to the written contract when they agreed that appellant should "appear of record and on brief"

(R. 10), then the omission of his name from that brief was no breach of the contract.

Appellant conceded in his opening statement (R. 28) that the defendant Hitt at the time of the hearing of the railway mail pay cases at Atlantic City, personally entered "the appearance of the plaintiff McGovern of record before the Interstate Commerce Commission as one of the counsel that was to handle the case"; that "in the final report of the Commission appeared the names of McGovern, Hitt and Cain as counsel" taken "from the original entries of the appearances by the defendant Hitt of record before the Interstate Commerce Commission." Appellant also conceded that in the report of the Commission on the further hearing on exceptions, appellant's name appears for the Short Line Railways (R. 28, and inserted sheet between pages 28 and 29, being the first page of the Commission's printed report). So there can be no controversy about his name appearing of *record* in the case. The complaint is that his name did not appear on the *brief* filed before the Commission on the hearing on the exceptions last above mentioned.

What this brief was is explained by appellant's counsel in his opening statement (R. 26) to the jury as follows:

"We will further show that in December of 1927, the defendant Hitt approached the plaintiff and requested him to perform some service **that was not within the terms of the contract** and which was practically impossible to perform."

Upon a request by the court (R. 26) to state a little more in detail what was meant, the following appears in the record as containing appellant's explanation and contention:

“After the plaintiff had completed the preparation of this case he then prepared the testimony. Under the practice before the Interstate Commerce Commission the attorneys or the rate experts can write out the questions and answers before the case goes to trial, and the questions are read by the attorney and the answers are read by the witness on the stand. It is all prepared in advance. It is called ‘canned’ testimony. He prepared the testimony, and the testimony was given on the stand for four days at Atlantic City, July 5, 6, 7 and 8, 1927.

“When he came back from Atlantic City he immediately wrote the brief based on his testimony that he had already prepared, and on the exhibits, the exhibits that he had prepared. Out of that he gathered an argument which was put in a printed brief. That brief was filed with the Interstate Commerce Commission as soon as it was completed and printed. **On that brief appeared the names of Moultrie Hitt, Ben Cain and Halsey McGovern.** That is his brief.

“After that brief was filed the case was set down for argument, and as was usual in these cases there was a proposed report filed by one of the Examiners; that is, the Examiner put out a report as to the findings that he proposed to make. Under the practice before the Interstate Commerce Commission the expert or the counsel who is handling the case is authorized to file exceptions to that proposed report. If he does not file exceptions, then that proposed report becomes final; it becomes the report of the Commission.

“So in this case, the defendant Hitt filed an exceptions brief on about June 26, 1928, in which he took exception to the proposed report of the Examiner. That was the second brief. On that brief appear the names of Moultrie Hitt and Ben B. Cain. Mr. McGovern’s name was not on it.

“That was the breach which we are alleging,

that his name was left off that second brief, the exceptions brief filed with the Interstate Commerce Commission”.

The Court: “May I ask whether the plaintiff had done any work on the preparation of that brief?”

Mr. Cook: “We expect to show your Honor and the gentlemen of the jury that the plaintiff did consult with and advise the defendant Hitt as to the preparation of the exceptions brief, and we expect to show, further, that more than 50 per cent of the exceptions brief was lifted bodily from the original brief prepared by the plaintiff”.

It further appears in the opening statement (R. 29) that this second brief upon which appellant’s name did not appear was one **“which plaintiff does not contend he had a right to prepare”**.

Now by turning back to the written contract (R. 10) it will be apparent that appellant is right in that position. We find that he had obligated himself “to prepare and write a first draft of the brief” and “to aid in its completion as far as might be desired”, and “to appear of record and on brief”. What brief? Clearly the brief which he was to write and of which he was required to write *only the first draft*. If anything were needed to show that the parties did not by their contract intend that he was either to write or appear on a second brief, it is found in appellant’s statement (R. 26) that this brief “was not within the terms of the contract” (R. 29) and that appellant “does not contend he had a right to prepare” it. That he did not prepare it is plain from the statement of plaintiff’s counsel, that he simply consulted with Hitt as to its preparation (R. 27, 28).

In the failure to have appellant’s name on the *second* brief there was therefore no breach of any covenant.

II.

THE COVENANT ALLEGED TO HAVE BEEN
BREACHED WAS NOT ONE WHICH APPEL-
LEE HITT WAS TO PERFORM.

The court will notice how carefully the parties segregated their respective obligations (R. 9, 10). Appellant was to do four separate and distinct things. Appellee Hitt was to perform five separate and distinct obligations. The covenant alleged to be breached was one which appellant himself (not Hitt) was required to perform; and the obligation was placed upon appellant rather than Hitt because the parties had in mind as hereinabove pointed out, that the brief was to be written by appellant and not by Hitt, and that on the brief which appellant was to write he was to place his name. There is certainly no suggestion that Hitt was to place appellant's name on any brief which appellant did not write, and which appellant *had no right to prepare!*

It might be pertinently asked what authority Hitt or anybody else would have had to place appellant's name on a brief which appellant not only did not prepare, but, so far as the record discloses, he had never even seen! The object of requiring a signature to a brief is that the tribunal to which it is presented may know what attorney "prepared and filed the same". 3 C. J. 1433, citing National Masonic Accident Association vs. Seed, 95 Ill. A. 43. To have placed appellant's name on this brief would have been an imposition on the tribunal with which it was filed, and if the brief had not incorporated appellant's views might have seriously reflected upon appellant.

III.

THERE CAN BE NO RECOVERY BECAUSE THE COVENANT ALLEGED TO HAVE BEEN BREACHED WAS AN INDEPENDENT, NOT A DEPENDENT ONE.

The rule on this subject is stated in 13 C. J. 614, as follows:

“The breach of a dependent covenant, a covenant which goes to the whole consideration of the contract, gives to the injured party the right to rescind the contract, or to treat it as broken and to recover damages for a total breach; but a breach of an independent covenant, or a covenant which does not go to the whole consideration of the contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, or warrant its rescission by the injured party. The latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation in damages.”

Page on Contracts (which is so frequently referred to in appellant's brief) Section 3238, page 5702 of Second Edition, states the law as follows:

“The question of the right to recover in quasi-contract in case of breach depends in part on the question whether the contract is entire or severable. If the contract is severable, it is, in effect, for this purpose a series of distinct contracts; and the breach of one covenant does not give the right to treat the entire contract as discharged and to recover the value of the performance on the remaining covenants.”

It becomes, therefore, important to determine when a contract contains dependent as distinguished from independent covenants. This has been authoritatively done by the Supreme Court of the United States in *Goldsborough vs. Orr*, 8 Wheat. 217, 5 L. Ed. 600, in which it is said:

“Nothing is better settled, both upon reason and authority, than the principle that where the acts stipulated to be done, are to be done at different times, the stipulations are to be construed as independent of each other.”

This rule has been repeatedly reaffirmed by the same high court in numerous decisions among which may be cited *Phillips Company vs. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Loud vs. Pomona Land & Water Co.*, 153 U. S. 564, 38 L. Ed. 822; *P. W. & B. R. R. Co. vs. Howard*, 54 How. 307, 14 L. Ed. 157; *Pollak vs. Brush Elec. Assn.*, 128 U. S. 446, 32 L. Ed. 474.

In *Kauffman vs. Raeder, et al.*, 108 Fed. 171, at page 179, 54 L. R. A. 247, 47 C. C. A. 278, Mr. Justice Sanborn, speaking for the Circuit Court of Appeals for the 8th Circuit, says:

“There is another principle of law which equally prohibits the maintenance of the theory of the defendants in this case. It is stated by Lord Mansfield in *Boone v. Eyre*, 1 H. Bl. 273, in these words:

‘Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.’ *Ritchie v.*

Atkinson, 10 East, 295; Stavers vs. Curling, 3 Bing. N. C. 355; Lowber vs. Bangs, 2 Wall. 728, 736, 17 L. Ed. 768; Hague vs. Ahrens, 53 Fed. 58, 3 C. C. A. 426, 3 U. S. App. 231.

“The breach of a covenant of the first class—a dependent covenant, one which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken and to recover damages for a total breach. Leopold vs. Salkey, 89 Ill. 412; Keck vs. Bieber (Pa. Sup.) 24 Atl. 170; Parker vs. Russell, 133 Mass. 74; Railroad Co. v. Van Deusen, 29 Mich. 431; Richmond vs. Railroad Co., 40 Iowa, 264, 275. But a breach of a covenant of the second class, an independent covenant, a covenant which does not go to the whole consideration of the contract and is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. Union Pac. Ry. Co. vs. Travelers’ Ins. Co., 83 Fed. 676, 679, 28 C. C. A. 1, 4, 49 U. S. App. 752, 759; Pordage vs. Cole, 1 Saund. 320, note; Campbell vs. Jones, 6 Term R. 570, 573; Surplice v. Farnsworth, 7 Man. & G. 576, 584; Obermyer v. Nichols, 6 Bin. 159, 160, 164; Burnes vs. McCubbin, 3 Kan. 221, 226; Butler v. Manny, 52 Mo. 497, 506; Turner vs. Mellier, 59 Mo. 527, 536; Pepper vs. Haight, 20 Barb. 429, 440; Appalachian Co. vs. Buchanan, 43 U. S. App. 265, 20 C. C. A. 33, 73 Fed. 1007.”

To the same effect see

Howe vs. Howe & Owens Ball Bearing Co., 154 Fed. 820.

An instructive note on this subject will be found in 59 Am. St. Rep. 278, appended to the report of Huyett and Smith Co. vs. Chic. Edison Co., 167 Ill. 233.

Can there be any doubt that under this rule the covenants here involved are independent and not dependent?

Appellant was to (a) prepare the exhibits; (b) present the testimony; (c) prepare and write a first draft of brief; (d) appear of record and on brief. Appellee Hitt was to (a) pay certain compensation in installments; (b) pay for an assistant for two specified months; (c) pay for clerical assistance; (d) pay certain traveling expenses. No one of these covenants on the part of either party was under the contract specified to be performed before or after performance of the covenants by the other. Appellant was to do his work as the exigencies of the situation might require; and appellee Hitt was to make payments in certain specified installments and at certain designated times, and was to perform his other covenants as circumstances might make it necessary. Surely the covenant that appellant's name was to appear of record and on brief had no relation in point of time to any of the covenants to be performed by Hitt!

As hereinabove indicated, authorities upon this subject are numerous.

IV.

IF ANY BREACH OCCURRED IT WAS NOT MATERIAL.

The right of one party to rescind a contract and sue upon a quantum meruit has been the subject of an enormous number of decisions by the courts of both

England and America, and is treated copiously by the text writers. There is no substantial difference among them as to what the law is. Whatever difference exists is merely in the manner of statement. All of them, including Page on Contracts, a quotation from which is found on page 6 of appellant's brief, and from Bishop on Contracts, referred to on page 9 of that brief, hold that the failure must be of at least a "*vital*" term, or "any substantial part comprehending the root of the whole."

The leading case on this subject is probably that of *Cutter vs. Powell*, 6 T. R. 320, which is annotated in a fifty page note in Smith's Leading Cases, Vol. 2, page 1. Summing up the entire matter the annotater says (p. 51):

"The great weight of authority on both sides of the water seems to establish the following propositions: (1) that where the contract is severable, *i. e.*, where the breach does not go to the whole consideration, there is no right of rescission for partial failure of performance, but the damages occasioned by such partial failure may be recouped. * * *

The principle upon which the weight of authority seems to rest, is that compensation in damages is all that can reasonably be asked where the contract is apportionable, and that, as Judge Denio says, 'the law no doubt intends to discourage people from breaking their engagements; but this is not generally accomplished by visiting them with a penalty beyond the damages sustained by the party injured'." * * *

"In general, it may be said, the law does not favor forfeitures. And there can certainly be no clearer instance of forfeiture than the loss of an entire bargain, because of a breach which has no real effect but on a small part of it. It is impossible to

draw any real distinction between cases where the contract is in form one, and where it is on separate pieces of paper. Each agreement is complete in itself, and may be rescinded for a breach which destroys it. But to enforce a forfeiture of all the similar agreements for a breach of one is to extend to forfeiture the greatest possible favor."

13 C. J. 613, states the rule as follows:

"The right to rescind, however, is an extreme one and does not arise from every breach. But where it exists, it may be exercised, although hardship results to the adverse party, or his creditors. The general rule is that rescission will not be permitted for a slight or casual breach of the contract, but only for such breaches as are so substantial and fundamental as to defeat the object of the parties in making the agreement."

The very recent work of Black on Rescission and Cancellation contains the following statement of the law, based upon numerous citations (See Sec. 197, p. 509, 550):

"Rescission of a contract is not permitted for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat the very object of the contract."

And, again, in Section 198:

"A partial failure of performance of a contract will not give ground for its rescission unless it defeats the very object of the contract or renders that object impossible of attainment, or unless it concerns a matter of such prime importance that the contract would not have been made if default

in that particular had been expected or contemplated. In an early and leading case it was said: 'It is not every partial neglect or refusal to comply with some of the terms of the contract by one party which will entitle the other party to abandon at once the special and solemn obligation entered into by the parties, and by which they had made for themselves the law which was to control them. In order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself.' This rule is inflexible where the partial failure of performance is such as may be fully compensated in damages."

An excellent statement of this principle as applied by the Federal Courts is found in *Kauffman vs. Raeder*, 108 Fed. 171, at pages 174, 177, which case has been hereinbefore referred to. The Circuit Court of Appeals, 8th Circuit, speaking through Judge Sanborn, says:

"May one party to a contract, who has accepted and retained the benefits of its substantial performance by the other party, retain and enjoy these benefits, and still rescind the agreement, and escape all the burdens and liabilities of the contract, because the first party has failed to perform at the exact time stipulated therein a subordinate covenant, incidental to the main purpose of the agreement, which goes only to a part of the consideration, and whose breach may be compensated

by damages? This is the most important question which this case presents.

* * *

“Can a party to a contract retain all the benefits of a substantial performance of it by the other party, and then escape all its burdens and repudiate all his obligations by means of such a technicality as this? There are two principles of law which forbid such a manifest injustice and compel a negative answer to this question.”

* * * * *

“One of the rules of law which compels a negative answer to the question now under consideration is that when a contract has been partially executed, and one of the parties has derived substantial benefits or has imposed upon the other material losses through the latter’s partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance, but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation in damages for that breach.” Citing many cases.

The second principle of law referred to by the court has already been discussed in this brief at pages 15 and 16.

In *Weintz vs. Hafner*, 78 Ill. 27, the court said:

“As was said in *Selby vs. Hutchinson*, 4 Gilm. 319, in order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and non-compliances in matters not necessarily of first importance to the accomplishment of the object

S. S. Thompson Co. vs. Atlantic Co., 148 Atl. 626.

Pollak vs. Brush Elec. Assn., 128 U. S. 446; 32 L. Ed. 474.

To the same effect, see

Loud vs. Pomona Land & Water Co., 153 U. S. 564, 38 L. Ed. 822.

In Hubbard vs. New York, etc., Investment Co., 119 U. S. 696, 30 L. Ed. 548, plaintiff had sued on the common counts in a case where the services had been performed, as in the case at bar, under a written contract. The question involved was whether there had been a default by the defendant in the execution of the contract in a material point. A directed verdict for the defendant was requested, and ordered. The Supreme Court of the United States affirmed the directed verdict, concluding its opinion with the following language:

“But in the present case no such recovery could be had, because it clearly appeared that whatever was done by the plaintiff in that behalf was done under the special written contract, and not upon any implied contract for compensation.”

For the second proposition appellant cites many authorities. Many more might be cited to the same effect where the circumstances are such as are disclosed in the cases referred to in his brief. Little detailed discussion of these cases will be attempted. Suffice it to say that most of them involve more or less complicated and disputed questions of fact upon the solution of which depends the determination of

whether the breach was material or otherwise. The appellate courts under those circumstances upheld the action of the trial courts in submitting such issues to the jury for determination. Generally speaking they were not cases in which the plaintiff sought a rescission of a written contract, but were suits brought for an alleged breach of such contract where the defendant attempted to recoup in damages. In nearly all of them the question of materiality of the alleged breach was submitted to the jury in connection with other issues. For instance, in the case of *Harris vs. Sharples*, 202 Pa. 243, 58 L. R. A. 214, upon which some stress is laid in appellant's brief, the lower court had attempted to submit to the jury certain issues which were immaterial and did not submit the issue as to whether the departure from the terms of the contract was material. The appellate court held as a matter of law, that the departure was material and that therefore the other issues should not have been submitted to the jury at all, but that defendant was entitled to a binding instruction in his favor.

So in the case of *Campbell vs. Houser Lumber Co.*, 265 Pac. 468, 147 Wash. 140, also cited by appellant, the court intimates that if it had not been for the conflicting evidence on the subject the court might have declared as a matter of law whether the breach was substantial. This portion of the opinion has been carefully deleted from the quotation on page 19 of appellant's brief, and is found in the opinion where the two stars are placed in that brief.

And in the case of *Lake Shore & M. S. R. Co. vs. Richards*, 152 Ill. 59, 30 L. R. A. 33, from which some lengthy quotations are found in appellant's brief on pages 16 and 17, a number of variations from the con-

tract were claimed to have occurred. Some of these were submitted to the jury to find whether they were material or not, and some were deemed so plain that the court instructed the jury as a matter of *law* that they were not substantial and that the jury should not consider them. The action of the trial court was affirmed.

In the case at bar there is no disputed fact and there was nothing to go to the jury, as decided by the Supreme Court of the United States in *Oscanyon vs. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

Hitt was to perform five distinct covenants (R. 10). If it can be justly claimed that, in spite of the fact that the obligation "to appear of record and on brief" was listed as one of *appellant's* covenants, nevertheless Hitt was required to perform it, this merely adds another to the five covenants which he admittedly performed. He paid appellant the entire compensation agreed upon between them, also for the services of the assistant Hunt, together with the clerical and traveling expenses incurred (R. 26, 29). Appellant's name was not placed on the second brief, which brief was not contemplated by the parties as being within the contract, and which appellant had no right or duty to prepare (R. 26, 29), **but his name did appear of record and on the main brief in the case** (R. 26, 28). His name also appeared as the representative of the petitioners on the printed "report of the Commission on further hearing" which was the report handed down on the subject-matter of the second brief (see insert between pp. 28 and 29). It was such reports, as this court well knows, and not the briefs, which circulated throughout the country. While it is conceivable that

the first brief, which dealt with the main questions involved in the case, might have been given more or less circulation, it is hardly probable that the second brief which was confined to exceptions to a proposed report by the Examiner and more than half of which, as appellant says in his opening statement (R. 28), was lifted bodily from the first, received any such publicity. Inasmuch as appellant's name appeared of record and on the first brief, the omission of the name on the second brief could not have materially damaged appellant. If any such damage had ensued, appellant by alleging and proving it could have recovered on the contract for the breach.

The whole foundation of appellant's right to proceed in this action is founded upon the theory that the covenant alleged to have been breached was a substantial one. And the test of substantiality is "that the object of the contract must have been defeated or rendered unattainable" by the breach.

Weintz vs. Hafner, 78 Ill. 27.

Pickens County vs. National Surety Co., 13 F. (2d) 758 at 762.

Beattie vs. Friddle, 229 Ky. at 363.

Putnam City Co. vs. Minnetonka Lbr. Co., 95 Okla. 149.

3 Williston on Contracts, sec. 1290.

13 C. J. 613, where the cases dealing with the right of rescission are discussed.

It is certainly not too much to say therefore that the breach must have resulted in *some* damage to appellant and this he ought to have alleged and been prepared to prove as a condition to his right to rescind. And not having alleged or offered to prove this (R.

11, 29) the necessary element of substantiality was altogether lacking.

In order to ascertain how substantial appellant considered the alleged breach, the Court during the course of the plaintiff's opening statement (R. 29) said to counsel, "I assume I am justified, Mr. Cook, in assuming that no actual damage was done to your client, from the statement which you have made". In reply to that, counsel stated: "We will not say he was not damaged, but we will say that we did not make any statement to that effect in the opening statement. We will let it go at that." Thereupon the court added: "I think I am justified in considering that as an admission that there was no damage, or no damage you can prove".

Inasmuch as the opening statement must show at least the essential elements of plaintiff's proposed evidence, and as his counsel with studied deliberation declined to say that appellant had been damaged at all, it is difficult to conceive how the court could treat the matter otherwise than it did, viz.: hold that there was not anything to submit to the jury as to the substantial character of the breach.

In every case cited by appellant on this point, and, it is believed, in every case which can be found in the books on the subject, the courts have considered it necessary that there should be submitted *some* evidence of substantial damage before a party will be permitted to rescind. Among the cases cited by appellant in which this clearly appears are the following:

Myrold vs. Northern Wisconsin Cooperative Tobacco Pool (Wis.), 239 N. W. 422.
Gibbons et al. v. Russell, 13 N. Y. S. 879.

F. A. D. Andrea Inc. vs. Dodge, 15 Fed. 2d. 1003.
Campbell vs. Houser Lumber Co., 147 Wash.
140, 265 Pac. 468.

Glover vs. Henderson, 120 Mo. 367; 41 Am.
St. Rep. 695.

Davis vs. Tubbs, 7 S. D. 488; 64 N. W. 534.

Referring further to the cases cited by appellant, the court said in Myrold vs. Northern Wisconsin Cooperative Tobacco Pool, *supra*, that there may be clear cases where it would not be necessary to submit to the jury the question of the substantial character of the breach.

The same statement was made by the court in Putnam City Co. vs. Minnetonka Lumber Co., 95 Okla. 149.

In the recent case of Speed vs. Bailey, 153 Md. 661, 139 Atl. 534, which, as appellant says, was relied upon by the trial justice, the court refers to the general rule on the subject as stated in Brantley on Contracts, page 415, and quotes a similar statement of the rule from 6 R. C. L. 926, 927, as follows:

“It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once. In order to justify an abandonment of it and of the proper remedy growing out of it, the failure of the opposite party must be a total one—the object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and non-performance in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself. Before partial failure of performance of

one party will give the other the right of rescission, the act failed to be performed must go to the root of the contract, or the failure to perform the contract must be in respect to matters which would render the performance of the rest a thing different in substance from that which was contracted for. * * * When a covenant goes only to a part of the consideration of a contract, is incidental and subordinate to its main purpose, and its breach may be compensated in damages, such a breach does not warrant a rescission of the contract, but the injured party is still bound to perform his part of the agreement, and his only remedy for the breach consists of the damages he has suffered therefrom”.

Commenting upon this rule the court says:

“By this rule, compensation in damages for slight breaches is substituted for the remedy afforded by rescission of the whole contract. The rule rests upon the principle that greater equity will be maintained between the parties by compelling the one, injured by slight variances or failure to comply literally with all of the terms of the contract, to accept the contract as performed and recover such damages occasioned by the breach as he may be able to show. A departure from this rule would result in permitting any deviation, no matter how minute or unimportant, to be made the basis for the rescission of the contract, and allowing the one so rescinding to obtain an unfair and unconscionable advantage by electing to rescind or retain the bargain, as self-interest might dictate. The great weight of authority shows a recognition of this principle by the courts, although they are not entirely harmonious. The real and substantial difficulty has been in applying the principle to the varying facts of each particular case.”

* * * * *

“The question presented to this court is, when reduced to its simplest terms, Does the declaration present so clear a case as to entitle the court to say, as a matter of law, that the contract has been substantially performed by the defendant? ‘Whether a given breach is material or essential, or not, is a question of fact; **but the question in a particular case may be so clear that a decision can properly be given only one way, and in such a case the court may properly decide the matter as if it were a question of law.**’ Williston on Contracts, Sec. 866. See, also, *Baltimore City vs. Schaub Bros.*, 96 Md. 534, 54 A. 106.”

The case from which the above is quoted involved a building contract which the defendant had performed with a slight exception as to which, as in the case at bar, there was no dispute. The court held as a matter of *law* that the deviation from the terms of the contract was not a substantial breach.

Appellant seems not to comprehend appellees' position in making a point of his failure to claim that any damage had been caused him by the alleged breach. Apparently he considers appellees' attitude to be that the plaintiff in his declaration in this case must allege *how much damage* he sustained by reason of the breach, and prove his quantum of damage. Appellant cites many cases to the effect that it would not be competent for him to allege or prove in a suit on a quantum meruit the quantum of damage for the breach of the contract. This is unquestionably the law, and will not be disputed by appellees. But it is universally held, as a reference to the cases hereinbefore cited will disclose, that before a party has a right to rescind he must show that *some* damage has been committed, or he does not make a case entitling

him to rescind, and he must show that this damage is so substantial that he really has been injured. If he is unwilling or unable to show that, the whole basis of his right to rescind is taken from under him.

V.

EVEN IN A SUIT UPON QUANTUM MERUIT THE CONTRACT WILL DETERMINE THE AMOUNT OF COMPENSATION.

It will be observed that under the contract (R. 10) appellant was entitled to \$5,000 only. He sues in this case for \$200,000.00 with interest (R. 2). He has been paid the entire \$5,000.00 (R. 26, 29, 12-18).

Some authorities are cited by appellant in the endeavor to satisfy the court that the appellant is not bound by the contract rate of compensation. Among them is Page on Contracts, which merely states that in a number of jurisdictions the plaintiff may recover the reasonable value of his performance without regard to the contract rate. This implies a divergence of authority and there can be no question but what there is a divergence of authority. The great weight of authority is in favor of the contention advanced in this respect by appellees. Fortunately this court is not left in the dark as to whether the minority or the majority rule should be followed, because the Supreme Court of the United States has definitely established the law in this respect for the District of Columbia which it says is reasonable and just and sustained by a preponderance of the best considered adjudications.

That court in *Ingle vs. Jones*, 2 Wall. 1, 10, 17 L. Ed. 762, says:

“While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done **but the payment of the price,*** he may sue on the contract or in indebitatus assumpsit, and rely upon the common counts. **In either case the contract will determine the rights of the parties * * *** He” (plaintiff) “must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant the cost of the work or materials has been increased, in so far, the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff’s deviations from the contract, not induced by himself, both as to the manner and time of the performance. There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications.”

The same learned court has said in *Perkins vs. Hart*, 11 Wheat. 237, 252, 6 L. Ed. 467:

“It has been already stated, that the three letters particularly referred to in this point, did constitute a special agreement upon the subject of commissions to be paid to Perkins by way of compensation for his agency in the sale of Hart’s lands. And, it may be added, that this agreement settles the subjects upon which Perkins was to receive compensation, and the amount of that compensation. If so, there can be no question but that the legal operation of this agreement, as to every claim founded upon it, is to preclude Perkins from recovering any compensation which is not consistent with the terms of that agreement. For, although in the cases before stated, in which

*Emphasis ours.

the special agreement has been executed, or otherwise closed, a general indebitatus assumpsit may be maintained, it is, nevertheless, true, that the special agreement may be given in evidence by the defendant for the purpose of lessening the quantum of damages to which the plaintiff is entitled."

To the same effect see

C. & O. Canal Co. vs. Knapp, 9 Pet. 566, 9 L. Ed. 222.

Shipman on Common Law Pleading, 2d Ed., pages 22 and 23, states the law as follows:

"If the special contract has been fully executed by the plaintiff, *and nothing remains but the payment of the price in money by the defendant*, the plaintiff may either declare in special assumpsit on the contract, or he may declare in general assumpsit, at his election. * * * Where the declaration is in general assumpsit, it is not based on the special contract, but on the defendant's legal liability to pay for the benefits received; *but the contract is evidence of the value of the benefits, and his recovery will be limited to the compensation therein fixed.*" (Italics ours.)

And adds:

"If, by the terms of the special contract, which the plaintiff has performed, he is to be paid, not in money but in specific articles, the declaration must be special."

40 Cyc. at page 2826 states that in such a case the recovery on a quantum meruit and on quantum valent will be limited to an amount not exceeding the contract price.

See also Bank of Columbia vs. Patterson, 7 Cranch 299; 13 L. Ed. 351.

Appellant on page 11 of his brief states that the minority rule has been adopted by the Supreme Court of the United States, and refers in support of this statement to the case of *Thomas vs. Brownsville etc. Co.*, 109 U. S. 522, 27 L. Ed. 1018. An examination of that case shows that appellant is entirely in error in this regard. The contract there sued upon was fraudulent and voidable and had been avoided because of the fraud. Under those circumstances only the court held that the contract price was not the proper measure of the plaintiff's recovery.

The case of *Blair Engineering Co. vs. Page Steel & Wire Co.*, 288 Fed. 662, cited by appellant as indicating that the Federal Courts had not followed the Supreme Court rule above announced, is also a case where the contract sought to be used as the measure of recovery was void and unenforceable.

And so also the case of *Riefkin vs. E. I. DuPont de Nemours Co.*, 53 App. D. C. 311, was a case in which the contract was found by the jury to be one which one of the contracting parties (an agent of the company) had no authority to make.

The Supreme Court rule has always been followed in the Federal Courts. See *Northern Theatrical Assn. vs. Hannigan*, 218 Fed. 359.

One of the best considered cases upon this subject is that of *Walker vs. Brown*, 28 Ill. 378, from which it would appear that the question resolves itself largely into one of pleading, the substantive rights of the parties being substantially the same whether the suit is brought on the contract or on a quantum meruit. That was an action in assumpsit against Walker. Plaintiff had done certain work under a contract signed by one Shergold for himself and he also signed the names

thereto of Walker and another, owners of property adjoining who were to be benefited by plaintiff's performance. Shergold was under the supposition that he had authority to sign the names of the other parties. Walker repudiated this authority. When sued on the contract Walker pleaded non est factum. This suit followed. Plaintiff obtained judgment below which was reversed on appeal, where the court stated the question to be "whether the contract under which the work was performed is to cover the remedy and right of recovery".

The court said, at page 383:

"We have no doubt, in reason and on authority, the contract must govern. * * * As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common sense, there cannot be an express and an implied contract for the same thing, existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree, that the law interposes and raises a promise.

"The error in this whole proceeding arises upon the assumption, that the plaintiff in error might become liable, under the implication of law, that he should pay the reasonable worth of services, beneficial to him, bestowed upon his property, with his knowledge and acquiescence, notwithstanding such services were rendered under an express agreement with another person.

"An express contract, executory in its provisions, must totally exclude any such implication. One party agreed, in consideration of the other to pay, to render the service; the other, in consideration of the promise to render the service, agrees to pay. One is the consideration and motive for the other, and each equally excludes any other consideration, motive or promise". Citing and quot-

ing from *Touissant vs. Martinnant*, 2 Term Reps. 104; *Cutler vs. Powell*, 6 Id. 324 (Lord Kenyon, C. J.) and also *Young vs. Paxton*, 4 Cranch 229; *Raymond vs. Barnard*, 12 Johns 374; *Whitney vs. Sullivan*, 7 Mass. 109; *Robertson vs. Lynch*, 18 Johns 456. Continuing the Court says: "This case" (apparently meaning *Robertson vs. Lynch*) "shows, if work is in fact done under a special contract, the plaintiff cannot recover under a quantum meruit. In this case, the work was done under a special contract made with a party assuming to act for the plaintiff in error, and the recovery must be had on that contract" (Citing other cases). "When the contract has been performed, the plaintiff may recover on simple contract the price of the service, under an *indebitatus assumpsit*, but the contract must regulate the amount of the recovery" (Citing *Bank of Columbia vs. Patterson*, 7 Cranch 299; *Holmes vs. Stummel*, 24 Ill. 370) * * * "The reason of the rule is plain. Parties are bound by their agreement, and therefore there is no ground for implying a promise when there is an express contract, and it can make no difference whether the contract is made by the parties themselves, or by others for them. The contract must be sued on * * *.

"But whether it be a general count on an *indebitatus assumpsit*, or a special count on the contract itself, the parties to the contract must be the parties to the suit, and be controlled by its provisions.

Again, the defendants seem to misapprehend the rule in another respect, for when work is done under a contract, the suit must be between the parties to it; and third persons, though benefited by the work, cannot be sued on an implied *assumpsit* to pay for that benefit, upon the idea that they cannot avail of the fact of the work being so done under a contract with others.

"It is true, as a general proposition, that if the owner of real estate will stand by silently, and al-

low another to go to work, and bestow his labor and materials for its benefit and improvement, that he ought to be liable upon an implied assumpsit to pay therefor, a reasonable compensation. Yet this does not apply, when that labor and those materials were bestowed under an express agreement.

“* * * The plaintiff in error had a right to set up and show there was a special contract with other parties, under which the work was done, and therefore that there could be no implied undertaking on his part, in law, to pay, notwithstanding the work was beneficial to him, and he stood by without objecting to its being done on his premises. Recognizing as we do, the validity of the special contract, in any form of action to recover for this work, it follows, as a corollary, that in any form of action which may be deemed proper to recover upon it, the parties to it must become the parties on the record, and the amount of the recovery must be regulated by the provisions in the contract. Any other rule would make contracts of little value, and the courts might become instruments of oppression in attempting to enforce them. Sound and long established rules must be adhered to. A general notion of administering equity in particular cases, should not induce courts to overturn settled principles. They might do more wrong than they would redress in the particular case.”

In *Ladue vs. Seymour*, 24 Wend. 59, 62, the Court says that while assumpsit will lie for the money due under an executed contract,

“It does not supersede the necessity of producing the special contract. On the contrary, the agreement must be shown, for the purpose of seeing whether it has been performed by the plaintiff, and whether the stipulated time and mode of payment was such as to warrant a recovery without declaring specially on the contract”.

To state this case briefly, it amounts to this: appellant agreed to perform for the sum of Five Thousand Dollars the service for which recovery is claimed in this case. Thereafter upon a fancied breach by appellee Hitt of an insignificant feature of the contract, which breach appellant does not claim damaged him at all, he seeks the aid of this court in order that he may recover Two Hundred Thousand Dollars more, still retaining the full Five Thousand Dollars already paid to him! Can such an astounding effort be sanctioned? Appellees respectfully submit that it cannot, and that the judgment of the Court of ^{below} Appeals should be affirmed.

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